92-811

Supreme Court, U.S.
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CASE NO.

IN THE

Supreme Court Of The United States

ARTHUR V. DEUTCSH

Petitioner,

v.

THE BIRMINGHAM POST COMPANY

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Was the defendant newspaper guilty of:

A. Targeting for dismissal the new Chief of Police because as stated by the defendant:

(1) He was not wanted in Birmingham.

(2) He was an outsider from Brooklyn, New York.

(3) He would not work out.

(4) He would not last six weeks.

(5) There were people in the Birmingham Police Department who were better qualified than he because he was from New York City and appointed by a black mayor who was hated by the all-white Fraternal Order of Police Union.

B. Telling the Chief that he should not sell his house in Brooklyn and should not buy a house in Birmingham because the defendant newspaper was going to make it "very hot" for him and "you're gone."

C. Scathing falsehoods written for the most part in editorials and admittedly based for the most part on sources known to be prejudiced and biased against the new chief and black mayor who appointed him.

D. Editorials written by an editor who testified that in almost every instance that he did not know whether his false and derogatory statements were true or false.

E. False and derogatory editorials and articles written by an editor who testified that he never consulted known transcripts or known competent witnesses before relying on false information given by known prejudiced and biased sources.

F. Known misleading and false headlines to articles and editorials, and did these factors combine and concur so as to constitute circumstantial evidence of recklessness or actual malice as such is tested by *Harte-Hanks Communication, Inc. v. Connaughton*, 491 U.S. 657 (1989).

CERTIFICATE OF INTERESTED PARTIES

Counsel of record for Plaintiff-Petitioner, Arthur V. Deutcsh, in accordance with Rule 28.1 of the Rules of the Supreme Court of the United States, certifies that the following listed parties have an interest in the outcome of this case:

1. Arthur V. Deutcsh.
2. Scripps-Howard Newspapers.
3. The Birmingham Post Company.
4. Burge & Wettermark, P.C., attorneys for the Petitioner.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Arthur V. Deutcsh, respectfully requests that this Court grant his petition for writ of certiorari seeking review of the judgment of the Supreme Court of Alabama dated August 7, 1992.

OPINIONS BELOW

The Opinions of the Supreme Court of Alabama have not been released for publication in the official reporter; however, the Opinions are reproduced at pages A-1 through A-6 of the Appendix hereto. No Opinion was issued by the trial court, The Circuit Court of Jefferson County, Alabama.

STATUTORY PROVISIONS CONFERRING JURISDICTION

The majority judgment of the Supreme Court of Alabama, without Opinion, was rendered on July 2, 1992. Plaintiff's application for rehearing was denied without Opinion by that court on August 7, 1992.

This Court has jurisdiction to review this case on petition for writ of certiorari pursuant to the provisions of 28 U.S.C. Section 1257.

CONSTITUTIONAL AMENDMENT INVOLVED IN THIS CASE

AMENDMENT 1

Religious and political freedom.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

On November 19, 1984, Police Chief of Birmingham, Alabama, Arthur V. Deutcsh, filed suit in state court against the Birmingham Post Company for malicious libel published by it in the Birmingham, Alabama morning newspaper, the Birmingham Post Herald.

Chief Deutcsh become police chief of Birmingham, Alabama, on December 21, 1981. He was from Brooklyn, New York, and had previously been employed as a precinct captain of the New York City Police Department. (Plaintiff's depo. Vol. I, p. 23) He was appointed by Richard Arrington, Birmingham's first black mayor. In early 1982, shortly after Chief Deutcsh became chief, the editor of the defendant, Angus McEachran, threatened the chief and targeted him for dismissal:

> You know you are not wanted down here and you are an outsider and they could have got a hometown boy * * * You're not going to last down here six weeks. * * * It just isn't going to work out. * * * We understand that you're on a year's probation. So, if you're smart, don't sell your house in Brooklyn.
>
> * * *
>
> And he let me know quite frankly that there were people in the department that he considered much better qualified, they didn't need somebody from New York City and especially somebody from New York City brought in by a black Mayor. And he let me know that I wasn't going to last too long in Birmingham, Alabama.
>
> * * *
>
> But he let me know what he was going to try to do and he almost very well did it, almost very well did it. That's really where it all started, back then and there.

Plaintiff's depo. Vol. I, p. 89-91.

A short time later the defendant's editor, McEachran, again threatened the chief:

> And he said, it's a good thing, I understand you still haven't sold your house in Brooklyn. He says, the year isn't up and things like that. I told you what we would do, we're going to make it very hot for you.
>
> * * *
>
> Well my year hadn't been up yet. He says, "you're gone." He says, "Don't sell the house in Brooklyn." He says, "You're not going to make a year." And that was in relation to the year's probation.

Plaintiff's dep. Vol. I, p. 93-94.

Subsequent to those threats by the defendant, the plaintiff claimed that the defendant acted in concert with the Fraternal Order of Police ("FOP") to oust him from his job as police chief by publishing numerous false and malicious editorials in order to get Mayor Arrington to fire the plaintiff. In support of this claim the plaintiff offered numerous publications by the defendant, most of which were false and based on known unreliable sources, when reliable sources were known and available to the defendant and which were published with a reckless disregard as to their truth in falsity.

EDITORIAL OF JANUARY 12, 1984 (EXHIBIT "A" TO APPENDIX)

The first publication was an editorial dated January 12, 1984. After Chief Deutcsh's probationary one year had elapsed and he was permanent police chief, he arranged to borrow a friend's truck and with his wife and a friend, move his household goods from Brooklyn to Birmingham. It was an inexpensive manner by which to get his family's belongings to Birmingham.

Subsequent to these plans and before they were executed, the City of Birmingham Personnel Director notified the chief that the move would be at the city's expense. In turn, a commercial mover contacted the plaintiff and made the move. At a City Council Meeting on January 4, 1984, the prior plans of the chief to move himself were discussed by all and recorded. The defendant had this recorded transcript and produced the record to the court although it never published in its articles about Chief Deutcsh, the chief's personal plan to move his family's belongings in a borrowed truck. Eight days later, the defendant published an editorial in which it stated that it was the chief's moving bill and again never mentioned the chief's personal plan to move himself but falsely withheld this information.

The headline of this editorial of January 12, 1984, was "Deutcsh's Moving Bill." The opening paragraph calls it a

"controversy" and "Chief Arthur Deutcsh's moving bill." It states that there is "a long standing policy not to pay such costs." The next paragraph indicates that it would be a misfortune for the city to pay for the move. The third paragraph (as well as the last two paragraphs of the article) invite a public lawsuit to keep the city from paying the bill. The agreement of the mayor to pay the bill (so clearly enumerated only eight days before) is falsely characterized as "an error made by City Personnel Director Gordon Graham." The balance of the editorial argued that payment of the bill violated the Constitution of Alabama as to additional funds paid during a public official's term of office and also violated the state bid law. There was no violation of the Constitution because Deutcsh was appointed at the pleasure of the mayor and not for a term of office. There was no violation of the state bid law because federal tariffs were involved and bidding on interstate household moves is a federal offense. The latter two legal maxims are taken from the opinion of U.S. District Judge Propst who granted summary judgment to Chief Deutcsh when he and the City of Birmingham were indeed sued at the obvious prodding of this January 12, 1984, editorial, written with full knowledge of the truth found in the transcript of the January 4, 1984, City Council proceedings. Mr. Seitz, who actually penned the editorial had this to say about his editorial in his deposition:

> Q. Is it true that you have never asked anyone connected with the Birmingham Post at any time to make any inquiry at your request prior to writing any editorial you have written about Chief Deutcsh; is that correct?
>
> A. that would be – I think that would be correct.
>
> Q. Can you think of any exception to that?
>
> A. No, not in connection with my editorials.
> Seitz depo. p. 14.

* * *

(BY MR. BURGE) Did you ever instruct any reporter for the Post Herald before you wrote any particular — any editorial about Cnief Deutcsh?

A. What do you mean by instruct?

Q. At any time. I mean give them instructions to obtain information prior to your printing that information as a fact in an editorial.

A. No.
Seitz Depo. p. 12, 13.

His newspaper had a transcript of the January 4, 1984, council meeting eight days before the editorial in question where the following occurred:

Councilman Myers: Gordon [Graham, City Personnel Director] answered some questions as well as the Chief did, when we discussed this before in previous meetings, Mr. Chairman. It was my understanding that the Chief had made other arrangements about moving himself. Are you aware of that?

Councilman Myers – Then subsequently – through you or the Mayor, his personal plans were changed to be consistent with someone else paying those expenses. Is that a true statement or not?

Graham – Yes, as I stated earlier –. I informed the Chief that the Mayor would take care of his expenses.

Councilman Myers – Well subsequent to that, did he change his plans on moving?

Graham – Obviously, he did.

* * *

Graham – He had been talking about getting a truck and going to New York and moving and wondered if I would go to New York City, and I said earlier I would be glad to help anyway I could, even moving furniture on the truck.

Councilman Myers – Those plans were subsequently changed after the conversation about somebody else taking care of these expenses?

Graham – I never loaded a truck in New York City.
(R. 1007-1011)

Yet, Mr. Seitz testified:

Q. Now, prior to writing the editorial of January 12th of 1984 on Chief Deutcsh's moving bill, did you ever have any information as to what arrangements Chief Deutcsh had made to move his furniture and effects to Birmingham prior to Mr. Graham's letter that you refer to in this editorial dated January 12th of 1984?

A. No, I don't believe I did.
Seitz depo. p. 20.

* * *

Q. (BY MR. BURGE) You made the statement in the editorial, January 12th of 1984, quote "An error," end quote. Quote "made by City Personnel Director Gordon Graham in a letter that he wrote to the moving company."

Now, I would like to know the source of your information that he made an error?

A. Basically it would have been previous reports in the Post Herald concerning that letter brought – when it was brought to the attention of the City Council.
(Seitz depo. p. 19, 20)

Q. (BY MR. BURGE) Did you ever speak to Mr. Baker?

THE WITNESS: No, no.

Q. (BY MR. BURGE) You never spoke to Baker.

And your next sentence says "Ms. Miglionico agrees with Baker." And you never spoke to Ms. Miglionico on this subject of the moving bill?

A. That's correct.
(Seitz Dep. p. 23, 24)

(8) And he knew nothing about federal prohibitions against bidding on interstate movement of household goods when he wrote the editorial:

Q. Have you ever heard of tariffs that are allowed to be charged in interstate commerce?

A. I have a vague idea. The term tariff I have heard.

* * *

Q. And you do not know, I assume, and never have known that it is a violation of the federal law for there to be a competitive bid made by a moving van company to move effects such as Chief Deutcsh's from New York to Alabama?

A. I do not know that.
(Seitz Depo. p. 26.)

* * *

Q. Well, let's talk about what you didn't know. You didn't know about the – you didn't know about the fact that his wife packed dishes and he had made arrangements for a truck to move his gear to Birmingham. You didn't know that; did you?

A. No.

Q. You didn't know that he never made any request of the city to move him. You didn't know that; did you?

A. No.

Q. And you didn't know that he had nothing absolutely to do with Gordon Graham writing the letter to the moving company saying that the city would accept their – their tariffs and move him?

A. No.

> Q. You had never spoken to Mayor Arrington about Chief Deutcsh other than the incidental mention that you have already told us about?
>
> A. Not that I remember.
> (Seitz Depo. p. 40, 41.)

As expert witness, Professor Glosecki, stated as to this editorial:

> * * * I personally sense here a priming of the pump – an invitation for the initiation of prosecution by some citizen who might decide to sue – "the controversy may not be over."

EDITORIAL OF JANUARY 13, 1984 (EXHIBIT "B" APPENDIX)

The day after the editorial "Deutcsh's Moving bill," a second editorial was written by Seitz, "The Deutcsh Predicament" dated January 13, 1984. In keeping with Exhibit "A", just reviewed, the editorial states complete falsehoods while again inviting the suit that was filed shortly thereafter:

> *He kept after the city to pay his moving expenses* long after the issue should been settled. He had been told the city did not pay such expenses before he was hired. But *that did not stop him and he may well have succeeded* with this week's council vote - barring some action by a court.

As shown by the quoted portion of Mr. Seitz' deposition, supra, this was a deliberate falsehood.

This editorial held plaintiff up to public contempt as a deadbeat who was trying to squeeze the city for something it did not owe. This is the only reasonable explanation for these falsehoods.

The lead-in paragraph to the above quotation was pure fabrication and is as follows:

> [The] answer is to be found in Arthur Deutcsh's character. It is a character that has become more visible *in his attempt to get the city to pay for his moving expenses.*

Again, the falsehood – used to impugn the plaintiff's character. Editor Seitz said the following in his deposition:

> Q. Then did you write the words "The main answer is more likely to be found in Arthur Deutcsh's character. It is a character that has become more visible in his attempt to get the city to pay for his moving expenses."
>
> A. I wrote that.
>
> Q. Now, what attempt do you make reference to there, sir; what attempt did he make to get the city to pay his moving expenses?
>
> A. I cannot give you the chapter and verse as to what happened, but –
>
> * * *
>
> Q. Do you have any judgment about when he requested it or who he made the request to?
>
> A. *No, I don't.*
>
> * * *
>
> Q. (BY MR. BURGE) Did you know at the time you made the statement – when you made this statement "It is a character that has become more visible in his attempt to get the city to pay for his moving expenses."
>
> At the time that you wrote that, sir, did you know whether or not he had ever actually made an attempt to have the city or made any request or any attempt to have the city pay for his moving expenses?
>
> MR. LEVINE: If you recall what you know at that time. Did you know?

THE WITNESS: *He did not and I did not* – he did not tell me that he had done that. And I did not see the actual documents by which that request reached the council.

* * *

Q. Well, *do you know* of your personal knowledge that the first knowledge he had that the city was going to pay his moving expenses was when he saw a copy of the letter of Mr. Graham, the letter that you said Mr. Graham was in error in writing; do you know that?

A. *I do not know that.*

Q. *Do you know* what arrangements he had made to himself for the truck to move his furniture to Birmingham prior to receiving a copy of Mr. Graham's letter?

A. *No, I do not.*

Q. *Did you know* his wife was in New York packing up things for him to pick up in a truck and drive to Birmingham at the time this letter from Mr. Graham was written?

A. *No, I do not.*

Q. Well, who is responsible at the Birmingham Post for finding out those facts that I have just stated to you before you write an editorial if you're going to rely on what the Birmingham Post says before writing an editorial about a man's character?

A. The reporters are responsible for inquiring into all stories. I base my opinions on those stories or the facts in those stories and my opinions of them.

* * *

Q. What is your interpretation as to the meaning of the word "character?"

* * *

THE WITNESS: *Character is the sum total of a person's behavior and actions.*

Q. (BY MR. BURGE) *And is that the context within which you use the word character about Arthur Deutcsh and the editorial of January 13th of 1984?*

A. *I believe so.*

Q. *Had you ever talked with Arthur Deutcsh prior to that date?*

A. *No.*

Q. *What did you know of the sum total as you just used that phrase* as describing a person's character insofar as Chief Deutcsh was concerned at the time you wrote this editorial of January 13th of 1984?

A. *I cannot tell you exactly what I knew* at that time and what I didn't know.

The references in this editorial as to plaintiff's ability to run a police department were also false. (Deposition of Plaintiff Volume II, pp. 249-283, R. 304, Line 8 - R. 327, Line 2).

The editor, Mr. Seitz, did not have any source material for the portion of the editorial quoted above. The only logical explanation is that he had been instructed to write something bad about the Chief and the truth was to be no obstacle per instructions of McEachran, supra.

Seitz spoke many times in this and later editorials using as sources the same names: FOP Presidents B. R. Stephens, Jimmy Sims, Carl Garrett, and Nolan Hopkins; FOP members Tommy McDonald, John Gjellum, Hank McWhorter, Billy Webb, Tommy Rouse, Ross Spurlock, and Wayne Roberson:

THE WITNESS: *I am not used to using the word competency* in reference to sources.
(Seitz dep. pp. 79-81)

Mr. Seitz admitted that the word "competency" never came to his mind when he referred to sources of libel against Chief Deutcsh:

Q. (BY MR. BURGE) Well, did you take into consideration any bias, any prejudice against Chief Deutcsh that any of your sources of information may have had prior to writing any of these editorials?

A. *Probably.* I can't remember specifically saying no, this is a biased source, therefore, I have to discount this much or that much. No. I am sure that somewhere in my thought process I considered such a matter.

Q. Did you consider that Lt. Stephens may have some prejudices and some bias against Chief Deutcsh?

A. *I could have very easily.*

Q. What about Mr. Billie Webb; did you take into consideration that he might have had some –

A. *I am sure I did.*

Q. The president of the Fraternal Order of Police, Mr. Jimmy Sims, did you take into consideration that he possibly could have had bias and prejudice against Chief Deutcsh?

A. *Yeah*, at some point or other *I probably did.*

Q. Would that also be true of Nolan Hopkins and John Katopodis?

A. *Yeah.*

Q. B. R. Stephens, I have asked you about.
(R. 2897-2899)

He answered in the affirmative as to B. R. Stephens earlier.

Professor Glosecki's interpretation of Seitz's editorial is that it is tainted and cleverly written to engender the reader's animosity toward and distrust of Chief Deutcsh. (R. 1086, Line 23 - 1098, Line 6.)

EDITORIAL OF FEBRUARY 10, 1984 (EXHIBIT "C" APPENDIX)

The next editorial by Seitz was written less than one month later, February 10, 1984, and is entitled "An Out-of-Control Police Chief." The plaintiff is said to be a "deep problem." The Mayor is impliedly asked to fire Deutcsh ("a problem that the Mayor seems reluctant to admit exists, much less to tackle"). The Chief is characterized as a "disaster." The police department is being "torn apart" by the actions of its Chief. The defendant cites no basis of any substance for those potent statements.

The chief had disciplined three officers, three of the defendant's main sources about the chief, FOP President B. R. Stephens, and FOP'ers Tommy McDonald and John Gjellum. Discipline had been imposed because they were guilty of the surreptitious tape-recording of their superior officers. This basis for calling Chief Deutcsh "out-of-control", a "deep problem", a "disaster", and a police department wrecker was stated to be:

> The disciplined officers and the FOP argue that regulations being cited in the charges are too vague.

The chief should have been lauded, not lied about by a newspaper for this commendable action.

The second basis for calling the chief "out-of-control", a "disaster", a "deep problem", and a department wrecker was stated to be his allowing a suspended officer to work on weekends because of that officer's financial hardships during his suspension. The officer arrested a drunk driver over one of those weekends. The newspaper editorial writer, Seitz, castigated the chief and applauded the dismissal of the charges against the drunk in municipal court, all because there was no written authority for the Chief of Police of Birmingham, Alabama, to allow a suspended officer to work on weekends so as to make ends meet.

Again, the chief's conduct should be applauded, not chastised. Hopefully, the drunk will think twice before he gets behind a wheel again. He will not be so lucky a second time as to be arrested by an officer whose qualifications are tested in court by the FOP's funneling information to the drunk's lawyer. But Seitz says that the plaintiff's conduct, in connection with that municipal court incident with the drunk driver constituted:

"A pattern of unacceptable behavior."

Again, Mr. Seitz lied.

The third basis is called a shouting match between the chief and one Russell Yarbrough, a city councilman, on January 4, 1984, at the city council meeting of that same date. Chief Deutcsh said Yarbrough did lie. Seitz rested a large part of the fabrications contained in this editorial on total belief of Yarbrough to the exclusion of the plaintiff. Seitz takes no issue with Yarbrough, a politician who was a used car dealer from 1934 to 1980. (Depo. of Yarbrough, p. 9.) Seitz never mentioned Yarbrough's background. He knew that few people would take the word of a long term used car dealer over anybody else's word. Yet, Seitz did and lied about the chief in doing so.

The next issue is referred to as a "serious allegation against Deutcsh" in connection with his efforts to get a known drug dealer out of the police department. A particular sergeant was a known drug dealer and, as admitted by Seitz, the chief's conduct there could have been "the result of temporary frustration, words spoken in the heat of the moment that Deutcsh had no intention of following up on."

The chief wanted the drug peddler out of the department — so Seitz calls him a "deep problem," *** "tearing the police department apart" because of his method – not his aim to get drug peddlers discharged from police duties!

After calling the chief a bully, an intimidator, arrogant, and above lesser mortals, these five "episodes", as Seitz called them, are then tied together with the following conclusion by Seitz:

The longer that Deutcsh is allowed to get away with his behavior, the more likely it is that the police department will collapse into total chaos.

The editorial ends with a prayer to Arrington to fire Deutcsh.

Q. Did anyone ever tell you that Chief Deutcsh quote "Enjoyed bullying people," end quote?

A. *Not* that I can recall.

Q. Did anyone ever tell you that quote "Deutcsh attempted to use intimidating tactics," end quote?

A. *No*, I can't recall anybody telling me that.

Q. Did anyone ever tell you that Chief Deutcsh had a quote "Arrogant tendency to place himself above the laws and rules that regulate the official conduct of lesser mortals," end quote?

A. *No.*

Q. What conduct of Chief Deutcsh did you have personal knowledge of that led you to make the statement that he had an arrogant tendency to place himself above the laws and rules that regulate the official conduct of lesser mortals"?

MR. LEVINE: Object to the form.

Q. (BY MR. BURGE) Any personal knowledge at all?

A. Personal as in did I witness, *no.*

* * *

Q. And this means the editorial of February 10th of 1984?

A. I have *no specific recollection* of talking to anybody about that editorial other than –

Q. Do you recall?

I am not talking about talking to them about this editorial. I am talking about talking to anybody that

gave you any factual information that led you to the conclusions or opinions that you state in this editorial dated February 10th of 1984.

A. *I can't recall anybody providing any factual information.* The best I can recollect, most of that appeared in the Post Herald in one form or another.

* * *

Q. Did you ever speak with Captain R. C. Taylor of the Alabama Bureau of Investigation before you wrote the editorial?

A. *No.*

Q. Did you ever speak with Russell Yarbrough about a shouting match he had with Chief Deutcsh prior to writing this editorial?

A. *No.*

* * *

Q. Then you state "What it takes is the will to do so. Mayor Arrington needs to acquire that will." Were you there calling for Mayor Arrington to fire Deutcsh?

A. No.

Q. Have you ever advocated in print that Mayor Arrington fire Deutcsh?

A. Advocated that he fire him? I have suggested that is one of the possible courses of action that could be taken.

Q. I use the word advocated. I don't mean any particular – that is the term of the art.

Have you ever proposed in print that Mayor Arrington fire Chief Deutcsh?

A. It was held out as one of the options in another editorial.

> Q. Is that all, just held out as one of the options? Is that your testimony as far as your writing is concerned?
>
> A. Yes.
> (R. 2865-2877)

The contents of the editorial were untrue. (R. 529, line 22 - 348, Line 15) The article was intentionally written to engender and foster hostility toward the chief by readers of this editorial according to Professor Glosecki by the use of pejorative and rhetorical language. It was "powerful" according to Glosecki. (R. 1098, Line 7 - 1112)

ARTICLE OF MAY 1, 1984
(EXHIBIT "D" APPENDIX)

This is an example of a deliberate use of a headline to falsify an article's content. The body of the article contained Chief Deutcsh's remarks to the Young Men's Business Club, dated May 1, 1984, wherein the chief:

> (1) Quotes statistics showing a reduction in crime in Birmingham of 23% over the last two year period.
>
> (2) Quotes statistics showing a reduction in the use of firearms by police officers to be down 50% for the last year.
>
> (3) Quotes statistics demonstrating that complaints against police officers were down 35% in the last year.
>
> (4) Said 50,000 to 60,000 people attended a football game at Legion Field and only four crime incidents were reported. He chided a newspaper for front page coverage of one of those incidents where someone was shot.
>
> (5) Asked the Young Men's Business Club as a group to assist him in the distribution of leaflets on auto thefts which were increasing in the City of Birmingham.

(6) Spoke of the "Circus" that had been made over moving expenses.

(7) Said secret taping of superior officers was reprehensible.

(8) Said the FOP Union was politically motivated.

What type of headline bantered this positive report on the activities of the Police Department of the City of Birmingham to a group of young business leaders? The headline was:

DEUTCSH ON DEFENSE.

EDITORIAL OF JUNE 21, 1984
(EXHIBIT "E" APPENDIX)

This editorial entitled "Check Previous List Before Buying Gifts" was written and published on June 21, 1984. Fun is poked at the chief and his wife. The irony is so bitter and the contents so false that the author, political columnist Ted Bryant was instructed after the fact by his superior at the defendant newspaper:

> "That I should not write anymore columns about the Chief." (Depo. of Ted Bryant, p. 38)

Professor Glosecki calls this editorial sarcastic, satirical and less disciplined than other editorials. The editorial infers a "messy coverup" by the chief and depicts a "nefarious" chief and conjures up a picture of "illegal actions" by the chief. The article is called a "biting verbal attack" including "Parthian shots," one refusing to recognize the truth of plaintiff's exoneration of wrongdoing by the Alabama Ethics Commission according to Professor Glosecki. This review of the editorial by Professor Glosecki strongly suggests the use of actual malice by the defendant toward the plaintiff. (R. 1163, Line 6 - 1173). Also, see *Ethics Commission of Alabama v. Deutcsh*, 494 So.2d 606, (Ala. 1986).

ARTICLE OF FEBRUARY 1, 1984
(EXHIBIT "F" APPENDIX)

This article dated February 1, 1984, is an example of the defendant's efforts to besmirch Deutcsh by use of prejudicial headlines. "Public Outcry Spurs Council to Action." The article referred to "The controversy surrounding Police Chief Arthur Deutcsh's punishment of three officers" for secretly recording transactions with their superiors. The "controversy" was manufactured by the defendant newspaper and its FOP correspondents, FOP Presidents Jimmy Sims, B. R. Stephens, and FOP'ers John Gjellum and Tommy McDonald. Council members Katopodis and Collins and FOP Attorneys Fitzpatrick and Barber all assisted the defendant in manufacturing a controversy so as to continue its efforts to get Deutcsh's job and execute Editor McEachran's mission to send the chief back to Brooklyn. They all defended the secret tapers.

This article headlights the length to which the defendant went to publish known falsehoods about an administrative action by a Chief of Police, an administrative action that was commendable in every way, except it was the chief who did it and the FOP did not like it. The defendant teamed up with the FOP and purposely lied.

ARTICLES OF AUGUST 18, 1984 AND AUGUST 20, 1984
(EXHIBITS "G" AND "H" APPENDIX)

This August 18, 1984, article is about a black murderer, subsequently convicted, named James Donald Lowe. The headline of the article is "Suspect in '83 Slaying Captured in R. I."

Two days later, on August 10, 1984, the defendant again aggrandizes a "frustrated and agitated Lowe" and falsifies time and again information from Lowe about Deutcsh. FOP'er Hank McWhorter comes to the murderer's defense. He is quoted several times. FOP President Jimmy Sims is quoted four times. Lowe praises Jimmy Sims who "wanted

the truth." Jimmy Sims praises Lowe, saying Lowe told him "these people are going to kill me" and that he was offered "any amount of money to say the chief didn't beat me up, and a ticket to go anywhere I wanted. I told him 'no deal'." FOP President Jimmy Sims praised Lowe's refusal of this deal and called Lowe "commendable."

The balance of the article is a self-serving declaration of Lowe's innocence and his fear of being killed before his trial begins. It is an effort by the defendant to bolster Lowe's credibility (and that of McWhorter and Sims) at the expense of Chief Deutcsh. The defendant knew the chief had already been cleared of untoward conduct toward Lowe by Mayor Arrington, the Internal Affairs Section of the Birmingham Police Department, and the United States Justice Department. (R. 357, Line 22 - 359, Line 10; 400).

ARTICLE OF SEPTEMBER 8, 1984 AND EDITORIAL OF SEPTEMBER 14, 1984
(EXHIBITS "I" AND "J" APPENDIX)

The headlines of these two articles, the first being an article by Kathleen Johnston and the second an editorial by Seitz, demonstrate the length and breadth of the defendant's libel of the plaintiff. The September 8, 1984, article is headlined "Cash gap grows; Deutcsh had Warning" and the editorial four days later is headlined "Deutcsh and Missing Money." One need not guess at the importance of headlines because only a few days before, on September 3, 1984, the defendant newspaper's editor, Mr. Brown, had authored an article that was published by the defendant on the subject of "Headlines." In that article Mr. Brown stated that the headlines should accurately reflect the story in a way that arouses the interest of the reader. The headline must be both factual and interesting and "must beat the drum" for the words that follow. These two publications are replete with falsehoods. The defendant knew that over a year before, on February 7, 1983, an internal audit committee had recommended that that money be deposited in the City Finance Department for

safe keeping and knew also that Chief Deutcsh had implemented this recommendation by November 21, 1983. It knew that Chief Deutcsh had written three different memos to the Mayor on the need for more security. The articles totally disregard the negligence of FOP'ers Rouse and Wall, the men put in charge of the property room by their chief long before and quotes their self-righteous indignation. (R. 359, Line 10 - 361, Line 6). The defendant falsely accuses the chief and purposely ignored his recommendations to the Mayor. It ignored the fact that he had properly delegated the security of the property room to two high ranking officers, FOP'ers Wall and Rouse. Interestingly enough, FOP'er Rouse, who could not handle the custody of the property room, was one of the three candidates submitted to Mayor Arrington at the time Arrington chose Deutcsh to be the chief. The defendant knew this and knew that Rouse would have nothing good to say about the man who got the job.

The editorial of September 14, 1984, is false in many ways. (R. 361, Line 24 - 374, Line 21). It was libelous in many ways. Its own headline "Deutcsh and Missing Money" implies guilt when the newspaper knew none to be present. The court will see the falsehoods and malice by Seitz from his deposition testimony:

> Q. Were you aware when you wrote this editorial referring to the security of the property room and the discovery that a large sum of money was missing, were you aware of Chief Deutcsh's efforts prior to the discovery of the missing money to upgrade the property room and its security?
>
> A. I knew that proposals had supposedly been made for that purpose.
>
> Q. By him?
>
> A. I believe so.
>
> Q. Did you state that in the editorial?
>
> A. I don't remember. I don't –
>
> * * *

Q. And what knowledge did you have of Chief Deutcsh's character at the time that you wrote this statement in this editorial quote "Reaction by public officials to unexpected situations often give valuable insight into the character of those officials. The property room theft has done so in the case of Arthur Deutcsh. Those insights are not reassuring, they are highly disturbing," end quotation marks.

Would you tell us, sir, what you were referring to there; what conduct of Chief Deutcsh you were referring to there and how in your opinion it reflected his character?

A. I believe we enumerated in that editorial if I remember it correctly some of the points that we – that were disturbing.

Q. And as I understand at the time that this was written, you had read the memorandum – the three memoranda that had been written by Chief Deutcsh to Mayor Arrington prior to the discovery of the missing money dealing with inadequate security at the property room and the need to upgrade the property room. Are you telling us that you read those at the time you made this statement about this character or not?

A. No. I don't recall reading the memorandum for sure. I was aware that some memoranda existed based on our news reporter.

Q. Well, before you criticize a man's character for his conduct in a particular case, here the security of the property room, shouldn't you read what that man has stated about the security prior to there being any discovered loss?

A. Read the specific words of the man, no, not necessarily.

Q. Before you wrote the words that the property theft has given valuable insight into the character of Arthur Deutcsh, am I to understand that you had

never read any of the memoranda he had written to his boss, the Mayor, about the conditions of the security of the property room?

A. I am confident that I have never read the complete memorandum. I may have read parts of them. I just don't remember.

Q. Do you remember how many there were?

A. No.

Q. Has anybody ever told you how many there were?

A. They may have, I don't remember it.

Q. Did you mention in this article – in this editorial even one of those memoranda, much less all three?

A. I don't remember.

EDITORIAL OF OCTOBER 10, 1984
(EXHIBIT "K" APPENDIX)

This editorial of October 10, 1984, praises the FOP, and demonstrates the defendant newspaper's effort to flex its muscles and muscle the plaintiff out of office with the help of its covey of correspondents at the FOP. The FOP poll was called "a serious indictment" and "another piece in the dismal mosaic being created by Chief Deutcsh." The "FOP poll is a proper method for expressing the opinion of the rank-and-file police officers" is the mind-set the editorial writer wants the reading public to believe when the editorial writer knew that any employee is subject to castigation by any poll of employees – particularly when the union, here the FOP, is conducting the poll for the nefarious purpose of getting rid of a member of management, the Yankee Deutcsh, and putting the Union back in control of the police department. Falsehoods are outlined at R. 379, Line 17 - 381, Line 8. It is seen that the defendant's manufacturing of news instead of reporting news was not getting rid of the chief. The editorial is now a bare knucks effort of last resort. To carry out Editor

McEachran's threats to the new chief. The efforts to insulate itself from libel by quoting time and again sources known to be unreliable is clear.

EDITORIAL OF FEBRUARY 15, 1985 (EXHIBIT "L" APPENDIX)

"Arthur Deutcsh The Problem Persists" dated February 15, 1985, contains falsehood after falsehood. The defendant's effort to insulate itself from these falsehoods by quoting FOP'ers McWhorter, Billy Webb, Gwen Webb, Jimmy Sims (President of the FOP at the time), Nolan Hopkins (Past President of the FOP), B. R. Stephens (future President of the FOP), their lawyers and political partner Katopodis has worn so thin that it is now transparent.

Review of the falsehoods contained in this editorial are contained in the record at R. 392, Line 25 - 402.

Deutcsh is called a "problem" a "bully," a "persistent and vindictive individual," who "acts as those rules and laws made for lesser mortals don't apply to him." This editorial, again by Seitz, refers to "a report" that Chief Deutcsh elbowed a lady newspaper reporter while she was asking him about "the Sims' affair" while in an elevator. The reporter never made any such accusation to the Chief or Mayor or anyone else and the defendant knew it.

The final thrust is for the mayor to fire the chief because of the chief's conduct as outlined in the editorial's references to the FOP'ers McWhorter, Webb, Sims, Hopkins, Stephens, and the homosexual politician, Katopodis.

The effort of the editorial writer to arouse hostility toward the plaintiff in the minds of his readers is clearly shown. Professor Glosecki's comment on this editorial at R. 1113-1162 indicates the newspaper's malice-as-usual.

FEDERAL QUESTION RAISED IN STATE COURT

A. The First Amendment defense was first raised in State Court at the trial court level on September 28, 1990, in argument on the defendant's Motion for Summary Judgment as follows:

> A. The Constitution Favors Dismissal Of All But *Most meritorious Libel Suits.*
>
> A quarter century ago, a unanimous United States Supreme Court held, for the first time, that the Constitution "delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct." *New York Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964). To successfully prosecute a libel lawsuit, the *Sullivan* Court held, a public official must present clear and convincing evidence that the allegedly libelous statements were published by the newspaper with knowledge of their falsity or "reckless disregard" for their truth. Id. at 282, 288.

B. At the appellate level it was first raised in the defendant's brief:

> We begin with a public official plaintiff's burden in a libel lawsuit – a burden made demanding and exacting by 25 years of constitutional precedent in the federal and Alabama courts. To establish a *prima facie* case of libel, and to survive a motion for summary judgment, Police Chief Arthur Deutcsh was required to provide clear and convincing evidence that a statement published by the Company was:
>
> 1. *false* and *defamatory;*
> 2. *of and concerning* him;
> 3. *not privileged*; and
> 4. published with *actual malice.*

See Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 775 (1986); *New York Times Co. v. Sullivan*, 376 U.S. 254, 288-91 (1964).

REASON FOR GRANTING THE WRIT

The Supreme Court of Alabama did not properly consider the circumstantial and direct evidence of recklessness and actual malice.

ARGUMENT

The Alabama Supreme Court, in a per curiam opinion, merely reviewed Deutcsh's burden of proof in this First Amendment case brought by a public official against a newspaper defendant and opined that he failed to meet the burden. It said that it reviewed the articles and found no proof by clear and convincing evidence of actual malice.

The opinion never mentions the threats to Deutcsh, a temporary police chief in Birmingham by the newspaper's editors that he would not last because the newspaper was going to make it "very hot" for him and "you're gone."

No case has extended the "threat" argument found in *State Rubbish Collectors Association v. Silizoff*, 240 P.2d 382 (CA S.Ct. 1952) to a cause of action sounding in libel. Nevertheless, *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989), implies that a court, in trying to determine whether there has been actual malice, i.e., publishing something with knowledge that it is false or with reckless disregard of its truth or falsity, *New York Times v. Sullivan*, 376 U.S. 254 (1964), should look to the underlying facts before making its final determination. While the newspaper's motives alone "cannot provide a sufficient basis for finding actual malice" those motives were considered "supportive of the court's ultimate conclusion that the record demonstrated a reckless disregard as to the truth or falsity of [the] allegations" in *Harte-Hanks*. In addition, motivation of the newspaper certainly was circumstantial evidence of the defendant's state of mind, a

legitimate inquiry on the issue of actual malice. *Harte-Hanks* held:

> . . . the evidence of motive were merely supportive of the court's ultimate conclusion that the record "demonstrated a reckless disregard as to the truth or falsity of Thompson's allegations and thus provided clear and convincing proof of 'actual malice' as found by the jury." 842 F.2d, at 847. Although courts must be careful not to place too much reliance on such factors, a plaintiff is entitled to prove the defendant's state of mind through circumstantial evidence, see *Herbert v. Lando*, 441 U.S. 153, 160, 99 S.Ct. 1635, 1640, 60 L.Ed.2d 115 (1979); *Tavoulareas v. Piro*, 260 U.S. App. D.C. 39, 66, 817 F.2d 762, 789 (en banc), cert. denied, 484 U.S. 870, 108 S.Ct. 200, 98 L.Ed.2d 151 (1987), and it cannot be said that evidence concerning motive or care never bears any relation to the actual malice inquiry.

In addition, the winning argument in *Harte-Hanks* was that the plaintiff was able to prove two things to the jury:

> (1) The credibility of a source used by the newspaper in reporting on the public figure was doubtful and known to be doubtful by the newspaper at the time.
>
> (2) The newspaper could have easily ascertained the truth by interviewing a known witness.

The Alabama Supreme Court never mentioned the threats made by the newspaper that they did not want Deutcsh here because he was from Brooklyn New York and had been appointed over local candidates for the job by a black mayor and the defendant was going to make it "very hot" for him. "You're gone" he was told by the defendant's editor. This, standing alone, does not reach the status of *New York Times v. Sullivan* actual malice but it is a circumstance to be considered. *Harte-Hanks*.

In addition, the Alabama Supreme Court never mentioned the defendant's admission that it knew its sources from the FOP were prejudiced and biased against the chief. Yet, the admission is a part of the record, taken directly from the testimony of Editorialist Seitz and quoted herein. The known unreliability of a source is held in *Harte-Hanks* to be a circumstance to be considered.

In addition, the Alabama Supreme Court's opinion never mentioned Editorialist Seitz's admissions, time and again, that he did not know much of what he wrote about Chief Deutcsh in his scalding attacks on the chief. But the admissions are there. They are clear and unambiguous. Standing alone they are cumulative with other evidence and persuasive of actual malice. Many falsehoods stated by Seitz were known to be false. Others were made without any regard for the truth. Certainly they are circumstances to be considered. *Harte-Hanks* recognizes that circumstantial evidence is ordinarily the only proof available of recklessness and actual malice. In the case at bar, this Court has Seitz's own admissions of his ignorance of the facts he distorted and fabricated. There is no need to infer what Seitz admits time and again.

The plaintiff in this case was admittedly targeted by this newspaper. It was going to run him back to Brooklyn and make the FOP happy. Of course, the evidence is monstrous that the defendant attempted to hit its target and, at the same time, embarrass its other target, Birmingham's first black mayor, the man who appointed Deutcsh over two other candidates from the Birmingham Police Department.

Proof of the editorials' constant prodding for the mayor to rid Birmingham and the FOP of Deutcsh as chief is clear, convincing and in black and white, i.e., admissions in the editorialist's testimony.

CONCLUSION

Certiorari should be granted and the case remanded for trial on the merits.

Respectfully submitted,

By:_____

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CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing have been served upon all parties required to be served: James E. Simpson, Esq., attorney for respondent, Lange, Simpson, Robinson & Somerville, 1700 First Alabama Bank Building, Birmingham, Alabama 35203, by forwarding three (3) copies thereof through the United States mail, first class postage prepaid and properly addressed, on this 5th day of November, 1992.

FRANK O. BURGE, JR.
Counsel for Plaintiff

APPENDIX

PRIOR OPINIONS
A-1 THROUGH A-6

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RELEASED
Jul 2, 1992

SUPREME COURT OF ALABAMA
SPECIAL TERM, 1992

1902000

Arthur V. Deutcsh

v.

Birmingham Post Company

Appeal from Jefferson Circuit Court
(CV-84-6388)

PER CURIAM.

The plaintiff, Arthur V. Deutcsh, appeals from a summary judgment in favor of the defendant, the Birmingham Post Company (publisher of the *Post-Herald* newspaper and hereinafter referred to as "the Post-Herald").

The issue is whether, in opposition to the Post-Herald's summary judgment motion, Deutcsh presented clear and convincing evidence of actual malice on the part of the Post-Herald.

Deutcsh was hired in 1981 to be the police chief of the City of Birmingham. Deutcsh claimed that the Post-Herald libeled him in 37 newspaper articles. In his complaint against the Post-Herald, Deutcsh claimed that the newspaper acted as a "publicity agent and publicity organ for certain officers of the Fraternal Order of Police in an effort to legitimatize the effort of the said officers of the Fraternal Order of Police to dispose of the plaintiff as Police Chief of the City of Birmingham." (C.R. 3.)

In his brief, Deutcsh claims that specific statements in the following 13 articles and editorials are libelous: (1) an editorial entitled "Deutcsh's moving bill," dated January 12, 1984; (2) an editorial entitled "The Deutcsh predicament," dated January 13, 1984; (3) an article entitled "Public outcry spurs council to action," dated February 1, 1984; (4) an editorial entitled "An out-of-control police chief," dated February 10, 1984; (5) an article entitled "Deutcsh on Defense — Chief praises city's crime stats while attacking media coverage," dated May 1, 1984; (6) an article entitled "Federal judge hands Birmingham $3,607 bill for police chief's move," dated May 23, 1984; (7) an editorial entitled "Check previous list before buying gifts," dated June 21, 1984; (8) an article entitled "Suspect in '83 slaying captured in R.I.," dated August 18, 1984; (9) an article entitled "Lowe tells of fear of death," dated August 20, 1984; (10) an article entitled "Cash gap grows; Deutcsh had warning," dated September 8, 1984; (11) an editorial entitled "Deutcsh and missing money," dated September 14, 1984; (12) an editorial entitled "No confidence in Deutcsh," dated October 10, 1984; and (13) an editorial entitled "Arthur Deutcsh — The problem persists," dated February 15, 1985.

Although Deutcsh's complaint and the amendments to his complaint mention more articles and allege specific statements of libel other than those alleged to be in the 13 articles listed above, Deutcsh did not discuss them in his brief. Therefore, we have no choice but to deem any claims of libel based on those omitted articles to be waived. Issues not argued in appellate brief are waived. *Bogle v. Scheer*, 512 So.2d 1336 (Ala. 1987); *Barrett v. Farmers & Merchants Bank of Piedmont*, 451 So.2d 257 (Ala. 1984); *Humane Soc. of Marshall County v. Adams*, 439 So.2d 150 (Ala. 1983). In determining whether the summary judgment was proper, our review is limited to the libel claims discussed in Deutcsh's brief.[1]

---

[1] Deutcsh mentions 14 headlines or portions of headlines in his brief that he claims are libelous. However, some of the headlines are not listed in his complaint and he does not discuss any of the headlines in his brief.

Deutcsh contends that the summary judgment was inappropriate because, he says, the articles published by the Post-Herald contained clear and convincing evidence of libel. We disagree.

> "The Constitutional guarantees [of the First and Fourteenth Amendments] require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964). The public official must present "clear and convincing proof" of actual malice. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 110 S.Ct. 2695 (1990); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

> "[R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice."

Pemberton v. Birmingham News Co., 482 So.2d 257, 264 (Ala. 1985), citing *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). If the published statements are true, there is no actionable cause for libel. *Pemberton*, 482 So.2d at 264.

> "Where a statement of 'opinion' on a matter of public concern reasonably implies false and defamatory facts regarding public figures or officials, those individuals must show that such statements were made with knowledge of their false implications or with reckless disregard of their truth."

Milkovich, U.S. at, 110 S.Ct. at 2707.

"[A] statement of opinion relating to matters of public concern which does not contain a probably false factual connotation will receive full constitutional protection." *Milkovich*, U.S. at 110 S.Ct. at 2706, citing *Hepps*, 475 U.S. 767. "Imaginative expression" and "the rhetorical hyperbole" traditionally used in public debate are protected. *Milkovich*, citing *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988).

"In ruling on a summary judgment in a libel action involving a public figure, the standard for the trial judge to apply is whether the plaintiff has shown, by clear and convincing evidence, that the defendant acted with actual malice." *White v. Mobile Press Register, Inc.*, 514 So.2d 902, 904 (Ala. 1987), citing *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485 (1984), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

Deutcsh was required to present clear and convincing evidence from which a jury could conclude that the Post-Herald made false and defamatory statements about him and that the statements were published with actual malice, once the Post-Herald had made its prima facie showing to the contrary. To show actual malice, Deutsch had to present by clear and convincing evidence that the Post-Herald had made the statements with knowledge that the statements were false or with a reckless disregard for whether they were false.

We have thoroughly reviewed the 13 articles. Viewing the evidence in a light most favorable to Deutcsh, we find no clear and convincing evidence of libel in any of the statements in the articles. Deutcsh failed to present evidence that the statements in the non-editorial articles were false and defamatory or that they were published with actual malice. Deutcsh failed to show that any of the statements of public concern in the editorials contained a probably false factual connotation. Also, Deutcsh failed to show that the Post-Herald had knowledge that any statements contained in the editorials were false or that the Post-Herald showed a reckless disregard as to whether the statements were false. Although many of the editorials are extremely critical of Deutcsh as police chief, mere criticism

without the proof of actual malice is not actionable. See, *Sullivan; Milkovich.*

Based on the foregoing, the summary judgment is affirmed.

AFFIRMED.

Hornsby, C. J., and Maddox, Almon, Adams, Houston, Steagall, Kennedy, and Ingram, JJ., concur.

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA
August 7, 1992

190200

Arthur V. Deutcsh v. Birmingham Post Company

County: Jefferson Cir.Ct.No.: CV-84-6388

NOTICE

The application for rehearing filed in this case is overruled. No opinion written on rehearing.

PER CURIAM — Hornsby, CJ., Maddox, Almon, Adams, Houston, Steagall, Kennedy and Ingram, JJ., concur.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 7 day of Aug 1992

/s/ Robert G. Esdale

Clerk, Supreme Court of Alabama

EXHIBIT A

Deutcsh's moving bill

The Birmingham City Council may have hoped to get the controversy surrounding Police Chief Arthur Deutcsh's moving bill behind it Tuesday when it voted, 6-3, for the city to pay the bill despite a long-standing policy not to pay such costs.

Unfortunately, that may not happen.

The council would have been wiser to seek a state attorney general's opinion before voting. Such an opinion might have headed off a possible lawsuit in which the city could be on weak legal ground.

The decision to pay is not unreasonable given the circumstances of the case. A strong argument can be made that the city has a moral obligation to pay because of an error made by City Personnel Director Gordon Graham in a letter he wrote to me moving company.

But there are some legal questions that may preclude the city's meeting such an obligation. Questions that were called to the council's attention by City Attorney James Baker and the council's own lawyer, Nina Miglionico.

Baker gave his opinion that the payment would appear to be a violation of the state constitution. Miss Miglionico agrees with Baker and voted against payment.

The city attorney also suggested that approval of the payment may be a violation of the state competitive bid law because the $3,600.00 moving bill exceeds $2,000.00.

Now we are not ones to argue that city councils should always follow the advice of city attorneys. To do so elevates such attorneys to de facto council membership. Their role is to advise, not to make the decisions.

There are times when such advice can and should be rejected, usually because the legal point is a close one that does not take into account the political situation or because the attorney is allowing his own political beliefs to color his legal

advise. The latter is more common among parttime city attorneys, although it also occurs with those who do not practice law outside their public employment.

But in this case Baker appears to make some valid points. To ignore his advise is to invite trouble.

We cannot say the council was hasty in its decision to pay Deutcsh's moving expenses. The controversy has been going on for some time and the decision had previously been delayed to get more facts.

However, the council was imprudent.

In light of Baker's legal views, the council should have sought an advisory opinion from the state attorney general before approving payment.

While an attorney general's opinion does not have the force of law, it does provide a sound legal defense when followed. An opinion supporting city payment might even head off a lawsuit.

As matters now stand, the city may be out on an indefensible limb should some citizen decide to sue over this expenditure of public funds.

The controversy may not be over and it could end up being even more expensive than the $3,600 that the council voted to pay.

EXHIBIT B

The Deutcsh predicament

Birmingham Police Chief Arthur Deutcsh remains something of an enigma, despite having been head of the city police force for two years.

Hired away from New York City, Deutcsh held promise of bringing a fresh eye to administering a department that, while competent, seemed to lack that little extra spark which sets apart a great police force from a run-of-the-mill one.

Deutcsh appeared to be a competent, if sometimes flamboyant, professional law enforcement officer. And in fact, he did make some internal changes that initially may have improved police performance.

But it is becoming increasingly evident that Deutcsh is failing at the most important aspects of being police chief, police-public relations and politics — in the broadest sense of the latter term.

This failure already is taking its toll on the department. If it is not reversed, the problems and controversies of recent months will be only the beginning of a decline in department performance.

A police department does not operate in a vacuum. It is part of a broader community with which it must interact. It must not only be open to suggestions from private citizens and responsive to complaints when they occur, it must reach out to involve the citizenry in crime-fighting efforts.

Much of this interaction with the community takes place at the beat and precinct level and involves individual officers. But it is the chief who sets the tone for the department.

While Deutcsh appears to have made the effort to reach out to selected members of this community, most notably prominent business leaders, he has not made the same effort in regard to the broader community. To the contrary, he has shut himself off from most contacts and tries to restrict sharply

the information that the public receives about the department.

We are not talking here about his refusal to answer reporters' questions or return their calls. This is merely a symptom of the deeper problem.

Deutcsh's seclusion would even be immaterial if, at the same time, he were not restricting the information that supervisors under his command can release. A police department can be open and accessible even if their chief makes only infrequent public statements and appearances. But prying all but the most rudimentary information out of the Deutcsh-run department is a difficult undertaking.

It is a difficult task even if you are an elected city official charged with making policy and budgetary decisions. We have lost track of the number of times this or that city council member has spoken out in frustration at the failure of Chief Deutcsh to provide information needed to make decisions.

Although he has not spoken out publicly, there are indications that even Mayor Richard Arrington, Deutcsh's boss, has had trouble getting information out of the chief.

Obviously, a police chief has no business in partisan politics that is campaigning for or against a candidate. But he does have an obligation to work closely with elected officials, to be candid with them about the operations of his department, both its successes and its shortcomings. No chief can hope to be a successful one without the cooperation of elected officials.

Yet, Deutcsh seems to have gone out of his way to irritate these officials, climaxing in last week's shouting match with Councilman Russell Yarbrough, one of the strongest advocates the police department has on the council.

Deutcsh has not done any better in the department's internal politics.

No chief can expect to have the unanimous and total loyalty of a large police force. There will always be dissenters, some of whom will attempt to undermine the chief and his policies. But a chief can earn the respect of the officers under his

command. He can reduce the level of dissatisfaction. He can keep overall morale at a high level. He can foster a greater sense of overall unity, even as disagreements on specific issues occur.

Deutcsh has done just the opposite. The department, which has had its share of factional disputes over the years, appears more divided than ever. Morale has been lowered. Individual officers are going public with their complaints in increasing numbers. The only unity he has forged is among officers who oppose him.

How did Deutcsh come to be such a failure as a police chief?

Some would explain it by the cultural gap that exists between New York City and Birmingham, between a street-wise Brooklyn copy and the less urban atmosphere of a southern industrial city.

Others would point out the difference between being a line supervisor in a gigantic police department and being the top man in a smaller department.

While each explanation has some validity, the main answer is more likely to be found in Arthur Deutcsh's character. It is a character that has become more visible in his attempt to get the city to pay for his moving expenses.

Deutcsh can be a persistent man. He kept after the city to pay his moving expenses long after the issue should have been settled. He had been told the city did not pay such expenses before he was hired. But that didn't stop him and he may well have succeeded with this week's council vote — barring some action by a court.

Deutcsh also appears to have an intimidating effect on others. At least he tries to have this effect. This was seen in his appearance last week before council members.

Most of the attention has been on the chief's shouting match with Yarbrough and Council President David Herring's unsuccessful attempt to quell it. Maybe it was just the shock of being called a liar — something no person who knows the veteran councilman would ever suggest, much less believe —

but Yarbrough's rather muted reaction after the exchange is evidence of Deutcsh's impact.

But that is only part of what Deutcsh attempted to do at the meeting. He also tried to divert attention from the rather substantial gifts that his family accepted form local businessmen by bringing with him much smaller and essentially meaningless gifts that council members had given members of his family. He tried to imply that there was not difference between the two.

His ploy worked, for the moment. The council never did get into the issue of the gifts and their acceptance being a possible violation of police department policy.

The problem for city officials, and most of all for Mayor Arrington, is to find a way of dealing with Deutcsh and reversing the damage he is inflicting on the police department.

EXHIBIT C

An 0ut-of-control police chief

If the matter could be viewed in isolation, Mayor Richard Arrington made a reasonable defense Monday of recent disciplinary actions taken by Police Chief Arthur Deutcsh against three Birmingham police officers.

Unfortunately, the actions of the three officers and the official reaction of Chief Deutcsh are not isolated events, as was proven again at Tuesday's City Council meeting and yet again in a federal court trial Wednesday.

They are symptoms of a much deeper problem. It is a problem that the mayor seems reluctant to admit exists, much less to tackle.

Simply put, the problem is the leadership and personality of Arthur Deutcsh. While Deutcsh has made improvements in a few aspects of police department operations, his overall impact on the department — and increasingly on all of city government — has been disastrous.

The Birmingham police force is not merely suffering one of its periodic episodes of poor morale as Arrington would like to believe. It is being torn apart by the actions of its chief.

The growing police opposition to Deutcsh is not a simple case of a departmental faction centered on the Fraternal Order of Police trying to flex political muscle as it has tried to do in the past. The unrest is many orders of magnitude beyond that possibility.

Nor can the increasing dissatisfaction of City Council members with Deutcsh be dismissed as simple City Hall politics. The situation is far more serious.

The extent of the Deutcsh problem can be glimpsed in several recent incidents.

* * *

A judgment on the appropriateness of Deutcsh's disciplinary actions against the three officers should be withheld until

appeals have been heard by the Jefferson County Personnel Board and/or the courts.

The appeal hearings will be the first opportunity the public has had to hear from witnesses under oath about the events leading to the demotions of B. R. Stephens from lieutenant to patrolman and Tommy McDonald from sergeant to patrolman and the suspensions of both officers along with Officer John Gjellum for from 30 to 45 days.

The charges against the three officers stem from secret recordings that McDonald and Gjellum, in separate incidents, made or tried to make of their conversations with other police officers. Gjellum is also accused of disclosing official police business at an FOP meeting. Stephens is accused of failing to report McDonald's action when he (Stephens) found out about it.

While we find the secret recording of conversations repugnant, it is not illegal under either Alabama or federal law if you are one of the parties to the conversation. The legal question is whether the recordings violated police department and personnel board rules and regulations.

The chief and mayor take the position that they do even though there was no specific written prohibition at the time the recordings were made. The disciplined officers and the FOP argue that regulations being cited in the charges are too vague for the officers to have known such recordings were prohibited and that the oral order Chief Deutcsh supposedly issued to ban such recordings cannot be enforced.

The legal argument will be settled by the personnel board or the courts. What is less likely to be addressed adequately is the widespread fear and distrust that led the officers to resort to surreptitious taping of fellow officers.

* * *

Another incident involving an oral order came to light last week in a court appearance by Deutcsh in an unrelated matter.

Deutcsh's exchange with an attorney representing a man charged with drunken driving and with Municipal Court Judge Emory Anthony illuminates the chief's arrogant tendency to place himself about the laws and rules that regulate the official conduct of lesser mortals.

The officer who made the DUI arrest was supposed to be serving a 20-day suspension at the time. Department regulations say that a suspended officer shall not act in the capacity of a police officer while on suspension. There is no provision for splitting the suspension period.

But Deutcsh unilaterally amended the suspension to allow the officer to work on weekends because of financial problems — he did not change the rule itself, just its application in this single case. Asked for what authority he had to change the rule for one person Deutcsh said "It's common knowledge."

Well it is not common knowledge to most of us that a police chief may change a rule on what amounts to a whim. If rules are to mean anything they must apply to everybody. If the rules are unfair, they can be amended through established procedures that include informing all who are affected. Chief Deutcsh did not do that in this case and Judge Anthony correctly dismissed the DUI case.

* * *

The Municipal Court incident is a relatively minor part of Deutcsh's pattern of unacceptable behavior. A more serious episode surfaced Tuesday in an exchange between Mayor Arrington and City Council members.

There is some question as to exactly what was said Jan. 4 in a closed meeting involving Deutcsh, council members and the mayor. Some council members believe Deutcsh said he had tapes on one or more of them — apparently derogatory in content. The mayor and other council members differ in their recollections, saying the word tape was not used.

But what seems clear from the public accounts of those who were in that meeting is that Deutcsh attempted to use intimidating tactics similar to those he employed in an open meeting that preceded the executive session. It would be in keep-

ing with Deutcsh's character as displayed in his shouting match with Councilman Russell Yarbrough that day and as noted by others who have had dealings with the chief.

The man seems to enjoy bullying people, hardly the behavior the public has a right to expect from any public official, much less a police chief.

* * *

Yet another serious allegation against Deutcsh surfaced Wednesday in the U.S. District Court trial of two Birmingham police officers indicted on charges of obstruction of justice and selling drugs.

Capt. R. C. Taylor of the Alabama Bureau of Investigation testified that Deutcsh offered to "trump up" administrative charges against one of the officers when investigators indicated in a Sept. 15 meeting of federal, state and city law enforcement officials that they were having trouble finding enough evidence to indict Sgt. Donald Boner. Taylor was called as a defense witness, but the federal prosecutors, who were also at the meeting, did not contradict his testimony.

If the chief's offer were an isolated incident, one might dismiss it as the result of temporary frustration on the part of a man who sees a goal slipping away, as words spoken in the heat of the moment that Deutcsh had no intention of following up on.

But the threat fits all too well into Deutcsh's overall pattern of behavior. It is another example of a man who does not seem to think society's rules apply to him, of a man who likes to throw his weight around.

* * *

We don't know if Mayor Arrington has called Deutcsh's hand in private on the chief's unacceptable behavior. Certainly, he has not done so in any way that has reached the public.

It may be that Arrington is at as much of a loss as many other people over what to do about Deutcsh. The chief has that effect on people, even when he is not trying to intimidate them directly.

Or it could be that the mayor believes whatever private actions he may have taken will bring the necessary changes. He might even be content with the chief's behavior, although we doubt it.

Another possibility is that Arrington — knowing that the personnel board will be looking over his shoulder at any but the lightest of disciplinary actions — would like to have concrete evidence of flagrant misconduct before doing anything. Some of the mayor's comments this week could be interpreted in this way.

For instance, Arrington went out of his way Monday to point out that the choice of Deutcsh as chief was all but forced on him by the personnel board. That is not the action of a man who is 100 percent behind his subordinate.

Then there was the council meeting Tuesday in which the mayor brought up what took place at the private session. It may have been a slip on Arrington's part. But it could just as easily have been a deliberate invitation to council members or others to step forward with clear evidence of wrongdoing by Deutcsh. Evidence that Arrington says he has not found in looking at previous allegations against the chief.

* * *

Unfortunately, none of the possible explanations for Arrington's inaction repairs the damage being caused by an out-of-control police chief.

The longer that Deutcsh is allowed to get away with his behavior, the more likely it is that the police department will collapse into total chaos.

There are sufficient grounds in the various episodes involving Arthur Deutcsh to call him on the carpet. What it takes is the will to do so.

Mayor Arrington need to acquire that will.

EXHIBIT D

DEUTCSH ON DEFENSE

Chief praises city's crime stats while attacking media coverage

May 1, 1984

By: Kathleen M. Johnston
Post Herald Reporter

Birmingham Police Chief Arthur Deutcsh said he isn't Superman and can't eliminate crime in the city, but he will strive to bring the crime rate to "an irreducible minimum."

In a wide-ranging question-and-answer session yesterday, the chief told members of the Young Men's Business Club that much of the controversy surrounding him is contrived and directed more at Mayor Richard Arrington than himself.

Deutcsh said he wanted to talk about statistics, particularly the 23 percent reduction in reported crime incidents in the last two years.

"Birmingham statistics across the board can't be matched by any major city in the country. We're going to continue to strive to reach that irreducible minimum. We can never eliminate crime. I'm not Superman. I don't walk on water."

He also cited statistics showing that the use of firearms among officers is down 50 percent and complaints against officers are down 35 percent. He later said the statistics cover a yearlong period, compared to a year ago.

He chided The Birmingham News for running a story on the front page about a man who was shot near Legion Field during a Birmingham Stallions game.

He said it appears to be a way of life for residents and reporters to accentuate the negative and "dump on Birmingham."

He said that while 50,000 to 60,000 people attended the game, only four crime incidents were reported.

"Yeah, someone got shot. He probably would have even if a cop had been on the street corner," Deutcsh said, adding that he thinks the story was not front page material.

Carol Nunnelley, News city editor, said the paper would have no comment at this time.

Deutcsh expressed concern that auto thefts were increasing in the city. Last month, the number of auto thefts increased m than 50 percent over the same month last year.

He asked the group to help him distribute leaflets to educate citizens on how to reduce the risk of car theft.

While Deutcsh focused his speech on statistics, questions from the group centered on his stormy relations with City Council members, local news organizations and members of his department.

"Artie Deutcsh became a bad guy two weeks before the election. Read between the lines. There is normally a cause and effect.

"Ninety-nine percent of the stuff wasn't directed by me," he said, adding that the mayor was a major target.

When asked if he would seek to change his strained relationship with the media and council, Deutcsh named several news executives with whom he gets along. He named people from The News and WBRC-Channel 6.

"There is not a person in this city or on the council who has asked the Police Department for something and hasn't gotten it," he said.

As an example of contrived controversy, he cited news coverage of whether the City Council would pay his moving expenses.

"I wonder why this was made into a circus."

The council, after a heated debate in which the chief and Councilman Russell Yarbrough called each other liars, voted to pay his expenses. Some citizens now are suing to prevent payment by the city.

"There must have been something decent happen in six weeks . . . (it was) incessant coverage of an innocence piece of nothing."

In referring to the Jefferson County Personnel Board's reversal of several of his disciplinary actions against officers, Deutcsh said his job is made more difficult by not having the exclusive right to hire and fire employees.

He said the public has not been fully informed about his demotions and suspensions of three officers disciplined for tape recording other officers.

The board overturned those punishments because the chief had no policy against taping.

"You people didn't get the straight stories. No place in the free world is surreptitious taping allowing."

He criticized the board for not allowing the city to let 12 witnesses testify against Sgt. Gabriel McCray, who was fired after being indicted in the Blue Vulcan drug investigation. McCray was acquitted of those charges by a federal court jury and reinstated by the personnel board.

He said Charles Wyatt, an assistant city attorney, "went to the Personnel Board with 12 witnesses and they said, 'That's not relevant; get rid of it' You didn't know that did you?" he asked the audience.

A hearing officer refused to let the city present those witnesses because their testimony related to charges the city filed against McCray one day before the officer's appeal hearing. Those charges were thrown out by the hearing officer because of the lateness in filing.

Deutcsh was asked if the Fraternal Order of Police, a police support group that has strongly attacked his policies, has a role in the department.

He said yes, adding that he was a member of the organization when he was an officer in the New York city Police Department.

"The FOP has a role in the Police Department. I think in the past the role has been misconstrued and has gotten involved in politics."

Deutcsh, who recently lost out on a job as chief of the Kansas City Police Department, said he is not actively seeking another position. but he indicated he would consider another position if something else comes along.

Deutcsh spoke before the group for nearly an hour. Later the chief, who has published a novel, said he has written two more books and hopes to see them published next year.

Both books are set in New York City, one is about police and the other concerns lawyers.

EXHIBIT E

Check previous list before buying gifts

June 21, 1984

Notice to Washington businessmen Arthur Deutcsh's wife probably has no need for a new lawn mower. The police chief said she received one as a gift after they came to Birmingham about two and a half years ago. Reports say it was valued at about $400.

One would suppose a lawn mower that cuts Alabama grass would also cut Washington grass.

That's the one thing about these gifts to the police chief's wife I don't understand. Why give her a lawn mower?

Although my wife has been pressed into mowing the lawn from time to time when I was on the road or suffering from one of those cases of acute laziness which seem to occur more and more often as I ge. older, I can say without reservation she would not appreciate a lawn mower as a gift.

Don't get me wrong. She would be perfectly happy if someone gave her husband a $400 mower. At least she would be pleased until I came home without a job or a paycheck.

Washington business folks ought to have a list of the items Deutcsh has received since becoming chief in Birmingham to avoid duplications if he's selected to head the U.S. Capitol police force. Reportedly, he's under consideration for the job and has letters of support from U.S. Reps. Ben Erdreich of Birmingham, Tom Bevill of Jasper and Ronnie Flippo of Florence.

In addition to the lawn mower, the Deutcsh family received a washer, a dryer, a trash compactor, a garbage disposal, a stove and a refrigerator sometime after the police chief arrived in town. He also stayed 15 months in the Passport Inn for $2,350, a savings of $12,000 upward — and that's just on the single room rate, not the cost of a suite such as the chief reportedly occupied.

It seems he also received a loan at 9 percent interest when the going rate was 11 to 12 percent. Anybody would appreciate a gift like that. It's money in the pocket.

Of course, the Washington folks could duplicate some of these gifts, like the low-interest loan. A couple of percentage points off a home loan makes a big difference any time.

And if the chief goes to Washington, he'll need an inexpensive place to stay until he finds a home, like the Passport. The Watergate might be appropriate in Washington.

The point is that these were gifts to his wife, not the police chief himself. At least that's how he explained the manner in which the gifts came into the household. Except the loan, of course. He signed that document. In such cases, we simply don't have any explanation.

Saying the kitchen appliances are more appropriate gifts for the wife would be somewhat chauvinistic, I suppose, but most wives I know would appreciate a new stove, refrigerator, trash compactor, etc., far more than a lawn mower.

Deutcsh is a former New York City cop and that fact may tell us something about what has happened since he came to Birmingham.

I admit knowing very little about the New York City police. The only time I've had an encounter with them was at the Democratic National Convention in 1976 when I asked a couple of officers at Madison Square Garden how to find a specific gate that had been designated the press entrance to the coliseum. They were from another part of the city and had no idea where the gate was located.

From Deutcsh's actions since he came to Birmingham, however, it appears that New York City police have considerably different standards than those we're accustomed to in Birmingham.

Standards here have changed over the years and it may be that we're ahead of the Big Apple in that department.

In years gone by, police officers in Alabama routinely accepted gifts from companies they dealt with, like wrecker firms

which depended on the officers to favor them when motorists needed their services.

Whether that still happens is a matter of speculation, but the officers surely have reason to start it up again. After all, the Ethics Commission has said their boss didn't violate any law when hundreds of dollars worth of merchandise was given to him — or rather his wife.

Billing indicates the gifts came through the Birmingham Area Chamber of Commerce, but chamber bosses have denied the organization officially gave the items to Deutcsh.

That's too bad. If the merchandise had come through the chamber, other officers would have a place to apply for their gifts.

Instead, if they want to follow the chief's lead, they'll have to contact individual businessmen to make their applications.

Of course, some in Birmingham do not believe the chief has done anything wrong. Bill Kelce, president of the Alabama Coal Association, said the press is crucifying Deutcsh.

The press has said what the chief did after his arrival here. From that information, the people can decide if the police force has proper leadership.

Meanwhile, I hope that was a riding law mower. It sure would be nicer than a push type on these hot days.

EXHIBIT F

Public outcry spurs council to action

The controversy surrounding Police Chief Arthur Deutcsh's punishment of three officers continued on several fronts yesterday.

Members of the Birmingham City Council, saying they have been inundated with phone calls from citizens outraged at the chief's actions, voted to request a full report on the matter from Mayor Richard Arrington.

Deutcsh demoted two officers and gave them and another officer lengthy suspensions for violating his verbal policy against secretly tape recording other officers. The department does not have a written policy forbidding such tapings.

But the council wasn't the only group to react yesterday to the chief's actions.

Robert Walker, president of the Guardians, an organization for black police officers, came out in support of the chief's rulings.

That support conflicts with the views of the Fraternal Order of Police, a support group of mostly white officers. Last week, FOP President Jimmy Sims called the chief's disciplinary actions administrative terrorism.

Meanwhile, Lt. B. R. Stephens, who was demoted two ranks to patrolman and suspended 30 days by Deutcsh, yesterday took what appears to be the first step in filing suit over the action taken against him. Attorneys for the officers have said they believe the charges against their clients violate individual constitutional rights.

Deutcsh, through a spokesman, refused yesterday to comment on the issue. He has not commented publicly since the matter surfaced early last month.

The officers — Stephens, Officer John Gjellum and Sgt. Tommy McDonald — said they haven't violated any written orders. Their attorneys said the suspension reports signed by Deutcsh do not indicate a reason for the disciplinary actions.

Both of those points were addressed by council members during the pre-council session.

"How can you suspend someone, or enact punitive action against someone, for a violation of an oral policy?" Councilman John Katopodis asked.

"I sit here stunned over what goes on in this place with Chief Deutcsh."

Bettye Fine Collins, who chairs the council's Public Safety Committee, recommended the resolution asking the mayor to review the punishments and the events surrounding them.

The resolution was not placed on the council's agenda. Mrs. Collins said she decided to bring up the matter after receiving more than 100 phone calls from citizens.

During the meeting she said, "There are some serious questions pertaining to his punishment. Were the actions taken based on violation of written policy? If so, what policies were violated? Is the mayor conducting a review? Can an investigation (by internal affairs officers) be fair and unbiased when the investigators can be subject to reprisals by the commander-in-chief to whom they must report?

"The citizens of this city are outraged by the action on the part of the police chief. The officers in question have given this city many years of meritorious service. Apparently this will be the first blemish on their professional records," Mrs. Collins said.

She concluded with a motion that the council request a full report from the mayor, but that request drew objections from Councilman Jeff Germany, who wanted to know the scope of the council's involvement.

"Because of the number of telephone calls we have received from the public concerning this action by Chief Deutcsh, we are simply asking for a report from the mayor. The police officers do have a right to appeal through the personnel board and the courts. We don't need to get into the matter of deciding if Chief Deutcsh is right or wrong," Germany said.

"I don't think the personnel board relieves us of our responsibility as it regards the police department in the city," Mrs. Collins responded.

"We're simply seeking a report. It is not our responsibility to take any action once the report is issued to us," Germany countered.

Katopodis said he doesn't ask for reports because he's interested in history. He said the reports are needed so the council can correct any possible deficiencies.

"I'd like to know when the chief gives an oral policy how the word filters down to the men on the street that that policy is in force," he said.

Arrington has said he approves of the disciplinary action. He said he talked earlier to Deutcsh about what actions could be taken against the officers. But he said he had not reviewed the matter in detail.

Yesterday, at the pre-council meeting, he said "I will not be able to give you a full report on this today because I'm just seeing this for the first time."

The resolution passed with support from council members, Mrs. Collins, David Herring, Katopodis, Nina Miglionico, Bill Myers and Russell Yarbrough.

William Bell, Eddie Blankenship and Germany abstained.

Walker said the Guardian's support of the chief in this matter should not be interpreted as racial.

"This is not a black/white issue. Our organization doesn't condone wrongdoing no matter who does it. The chief indicated taping is illegal in this department. I'm truly a believer in rules and regulations. I think it was justified."

Stephens and McDonald were charged in an incident involving the secret taping of internal affairs Sgt. Eugene Mosby and another officer. Mosby is a member of the Guardians.

"They tried to do Sgt. Mosby an injustice. I've talked to most of our officers and they indicated they were in favor of the punishment."

Walker said if an officer in his group was disciplined for the same infraction, he'd support the chief but would help the officer in his appeal process hoping to reduce the penalty.

Although the Guardians agree with Deutcsh in this incident, Walker said his group has a general problem with the chief's punishment procedures citing two instances in which he felt disciplinary action was excessive.

"His punishments are often inconsistent. The only problem we have with the chief is his double standards on punishment."

Walker said Mosby is in line for a lieutenant position when a vacancy occurs. But he emphasized that was not a factor in supporting the chief's rulings.

Stephens, who said he was encouraged by the council's resolution, said he agrees with Walker that the matter is not racial.

"The issue was never Mosby. We would have done the same thing no matter who the officer was. We felt there was wrongdoing and wanted to protect ourselves and the officer being questioned."

At the time of the taping, Mosby was investigating a citizen's complaint that accused the officer of brutality.

Stephens yesterday retained former FOP attorney Ray Fitzpatrick. Fitzpatrick will serve as co-counsel with David Barber.

Fitzpatrick avoided direct comment concerning lawsuits over the matter but indicated that was an option.

"I'm certainly researching the possibility of litigation, but at the present time we're immediately concerned with an appeal to the personnel board to review the legality and propriety of the actions of the appointing authority (Arrington)."

Fitzpatrick said he was disappointed the three black members of the council abstained from voting on the resolution.

"I think it's very proper for the council to get involved. Once again, I'm disappointed the council continues to split along racial lines."

Bob Sutton, who appealed Gjellum's 45-day suspension said he is pleased the council addressed the issue.

"I think a lot of people are interested in what's going on in the department."

McDonald is also represented by Barber. He was demoted to patrolman and given a 30-day suspension.

EXHIBIT G

SUSPECT IN '83 SLAYING CAPTURED IN R.I.

By Kathleen M. Johnston
Post-Herald Reporter

James Donald Lowe, charged with murder in last year's slaying of a Birmingham waitress, was arrested yesterday in Providence, R.I., after a fight with his wife apparently persuaded her to turn him in.

Police surrounded an apartment in which Lowe, who has been sought for 10 months, was hiding. As the suspect was trying to flee, officers grabbed him.

"I told him he was wanted in Birmingham, Ala., for murder and he said, 'I didn't do it. They're trying to frame me'," detective Steve Cross said yesterday. Lowe was protesting his involvement in the killing of Dana Constance Fowler, a waitress at the Down the Street restaurant, where Lowe also worked.

Lowe also was a central figure in several lengthy investigations of Birmingham Police Chief Arthur Deutcsh. Four Birmingham police officers said Deutcsh abused Lowe when he interrogated him alone on June 8, 1983.

Cross said Lowe's arrest came after a woman identifying herself as Lowe's wife, Geraldine, contacted authorities.

Cross said Lowe had been working at a manufacturing plant in Johnston, R.I., near Providence, for at least three months. The Lowes were living in a housing project in Providence when a patrolman answered a domestic disturbance call about 7 a.m. The pair apparently had a scuffle over some keys.

While the officer was questioning Mrs. Lowe, her husband left the apartment.

"After he left, she takes this newspaper article from a Birmingham paper and shows it to the officer," Cross said.

The officer then called detectives. Mrs. Lowe told them her husband had been working at the manufacturing plant under the name of Leon Wright.

Leon Wright worked at the Down the Street restaurant where Lowe had been employed as a cook.

Police went to the plant and talked to the personnel manager, who described Lowe as a good employee. He told Cross that Lowe had called that morning to say he wouldn't be working there anymore.

"He sent someone there to pick up his check but we missed him. But Lowe had another check and when the guy came back, we were there."

That man, Carlos Rodriguez, told police Lowe was waiting form him and the check at an apartment in the housing project.

"We went over there with plenty of police and a lot of shotguns. The metal door was locked and we got a pass key. We got in and he tried to run but we caught him in the bedroom.

"I just said, 'You're James Lowe and you're under arrest'."

Cross said Lowe identified himself by his real name. Lowe told officers he was being framed. Police took him to the Providence jail.

He was arraigned in U.S. 6th District Court in Providence yesterday afternoon on fugitive charges. Cross said Lowe will not fight extradition.

After yesterday's proceedings, Lowe was taken to a Cranston jail facility where he is being held in lieu of $500,000 bond, Cross said.

Birmingham homicide, Sgt. Bill Gaut said he will fly to Providence Tuesday to bring Lowe back to Birmingham.

Lowe was scheduled to go on trial earlier this year in Birmingham for Miss Fowler's slaying. When he failed to appear, Judge William Cole ordered his arrest and the forfeiture of $25,000 in property bonds.

Miss Fowler, 19, of 4216 Groover Drive, was found shot to death on an isolated road in southwest Birmingham May 26,

1983. She had failed to come home after working at the restaurant where she had been employed about two weeks.

Lowe was picked up for questioning June 8, 1983. Two days later, he was charged in the slaying.

On July 14, Lowe, free on bond, was abducted from a residence on Escambia Street by two men. He escaped his abductors in Tarrant. Miss Fowler's father, Arthur, was arrested in the abduction.

Lowe failed to show for a hearing in the kidnapping and the charges were dropped. Fowler recently posted a $2,000 reward for the arrest and conviction of Fowler.

On October 6, Mayor Richard Arrington received a letter from Officer Hank McWhorter asking for protection and a leave of absence because, he said, he was a key witness in a possible Justice Department investigation of Deutcsh.

That letter led to the internal affairs investigation of the chief and the subsequent Justice Department investigation into the matter.

Arrington said the internal affairs probe failed to substantiate the allegations, although the mayor said the chief pushed Lowe into a chair.

This summer, the U.S. Justice Department closed its investigation because of insufficient evidence. Deutcsh denied any wrongdoing and Lowe earlier refused to answer questions about the interrogation.

But the Fraternal Order of Police yesterday released the Aug. 15 results of a polygraph test on McWhorter.

"It is the opinion of this examiner (Clyde A. Wolfe of Commercial Polygraph Inc. on Montgomery Highway) that the subject told the truth during this . . . examination," the test concluded.

In Three tests, McWhorter showed no deception on any question, including these (all of which were answered, "Yes").

- "Did you hear sounds of a fight in the room where Lowe and Deutcsh were?"
- "Did you hear Lowe scream, 'Please don't hit me'?"

- "Did Lowe tell you that Deutcsh wanted to kill him?"
- "Did Lowe tell you that Deutcsh . . . wanted to hit him?"
- "Were Lt. (J. R.) Davis and Inspector (B. R.) Goforth with you during this incident?"

When Deutcsh came out of the interrogation room, McWhorter said he noticed a chair overturned and Lowe crying. McWhorter said the chief told him, "That's going to be a tough cookie to crack."

Sgt. Jimmy Sims, president of the FOP, spoke bitterly of the involvement of ranking officers.

"Some of the leadership had rather hide in their obscure little corners rather than aggravate the chief by standing up for the Birmingham Police Department. . . . We don't think an adequate investigation was done, and in our opinion, if all the leadership . . . had the courage and dedication to the truth that McWhorter has, we would have a much more efficient police department than the big mess we have.

"The man has told the truth. As wild and outlandish as it is, he told the truth."

EXHIBIT H

Lowe tells of fear of death

By Kathleen M. Johnston
Post-Herald Reporter

PROVIDENCE, R.I. — In a stark room in a Cranston, R.I., prison, James Donald Lowe talked for the first time in more than a year about the death of a Birmingham waitress and his interrogation by Police Chief Arthur Deutcsh.

Lowe was arrested in Providence on Friday after a fight with his wife that prompted her to turn him in, has been living what he calls a calm and comfortable life in Providence for nearly 10 months.

That life contrasts sharply with the last five months he spent in Birmingham. Beginning June 8, 1983, when he was picked up for questioning in the slaying of a co-worker at the Down The Street restaurant, Lowe said, he was harassed by everyone and the harassment began when he was interrogated alone that day by Deutcsh.

He was charged two days later in the shooting death of 19-year-old Dana Constance Fowler.

Lowe was abducted July 15, 1983, by two men, allegedly hired by the dead woman's father. He escaped with bruises.

But it was the publicity about Deutcsh's interrogation that made his life a nightmare, he said. A string of investigations ensued when officers in October said Deutcsh abused Lowe. Lowe wants no part of that controversy, saying he just wants to be left alone.

Saturday morning, a frustrated and agitated Lowe spoke for 90 minutes in a visitor's area about the ordeal, denying any involvement in the slaying. In a room furnished with only chairs and a long table separating visitors from the prisoners, Lowe said he once was offered a deal to stay quiet about his

confrontation with Deutcsh, and he believes he will be killed before he comes to trial.

Barely pausing in his account, he began by talking about Deutcsh, in the kind of detail he had previously used only in talking to his former lawyer, Charles Purvis, and a man from the U.S. Justice Department in Washington.

Now-retired homicide Sgt. James Gay, who headed the Fowler investigation, and another officer had been talking to Lowe about Miss Fowler. They left when Deutcsh walked into the interrogation room.

"I was in the room with Sgt. Gay and another detective. They were talking to me about the girl. The chief came in.

"He said, 'Do you know who I am?' and I said 'No I don't.'

"He said, 'Well, I'm the chief of police.' He said, 'James why did you kill that girl?' and I told him I didn't. I told him that about three times.

"We were raising our voices. I was standing up. We were getting louder and louder.

"At that time he pushed me hard. I fell into the chair, I yelled, 'I didn't kill that girl and you can't make me tell you that I did.'

"I was highly upset. I had handcuffs on in front of me. The chairs were in a line. They caught me from falling. I don't remember if they fell.

"I was going out. I just tried to go out. I thought, I'm not charged with anything. I was leaving. At that time they didn't have any charges against me. Sgt. Gay and another guy came in.

"At that time I was crying. As I was coming out of that room, the other guy stopped me. I was crying. I told him I wasn't going to talk to him any more because I was highly upset."

In October, the incident was made public when Officer Hank McWhorter, who had stood outside the interrogation room, wrote a letter to Mayor Richard Arrington asking for protection.

Statements written by McWhorter, Gay and Lt. J. R. Davis detailed the officers' version of what happened.

Deutcsh issued a statement denying any wrongdoing. The statements by the three officers, all of whom were outside the interrogation room, are similar to Lowe's account.

No one answered the phone yesterday at the Deutcsh residence. The chief's spokesman, Inspector B. R. Goforth, said he did not think he could reach Deutcsh until today.

After receiving McWhorter's letter, the mayor ordered an internal affairs investigation into the matter. He said Lowe denied anything happened and allegations against the chief could not be substantiated.

Later, hearing of the officers statements, the mayor said he thought Lowe may have been pushed.

Lowe said Saturday he refused to talk to any police officers, including the internal affairs officers.

"No. I didn't want to talk to them. I never talked to the FBI."

The FBI conducted its own investigation and sent its findings to the Justice Department.

"I talked to someone from the mayor's office when it hit the paper about the police chief. It was a black guy. (I talked to) the guy from Washington because he showed me his credentials.

"Sgt. (Jimmy) Sims came to me. He said he wanted the truth. I told him I wanted to be left alone. I am scared of your chief of police."

Sims yesterday said he remembers making those comments when Lowe, who was free on bond in the slaying was arrested on a burglary charge Oct. 12 and brought to City Jail at the beginning of Sims' 3 to 11 p.m. shift as jail supervisor.

Sims said internal affairs officers told him "to give him every consideration. He was scared to death." He talked briefly to Lowe, who asked him to call the mayor. Sims said he couldn't reach Arrington.

"I think he made a statement like 'These people are gonna kill me. These people are gonna kill me.' He was highly upset."

Lowe said Deutcsh was the first person to accuse him of the Fowler slaying

"He has no reason to put his hands on me, period. I was handcuffed. If he wanted to talk to me, I was talking." Lowe had been talking to Gay before Deutcsh arrived.

Lowe talked to a Justice Department investigator at his attorney's office. Purvis yesterday said Lowe talked to the lawyer, Craig Schaffer, alone.

"They were in there by themselves. That was the way he (Lowe) wanted it. He was a very strange client."

Lowe said he told the lawyer the chief pushed him. Describing the actions to a Birmingham Post-Herald reporter, Lowe reached over a table and placed his hands firmly on each shoulder.

"After he pushed me, the only thing I said, 'I didn't kill that girl and you can't make me.' I don't recall him saying anything. I didn't even look at his face."

Lowe said he told the Washington official Deutcsh did not hurt him, and that he did not want to press charges. In May, the Justice Department closed its investigation because of insufficient evidence.

"The guy from Washington said he couldn't talk to me about the murder charges. Just about the chief. . . . I told him, 'No I don't want to press charges against him. I just want everyone to leave me alone."

Purvis said Lowe thought he was being pursued by everyone.

"There were certain people wanting him to say things bout Deutcsh and there were people on Deutcsh's side wanting him to say nothing at all."

Lowe said that while in jail in Birmingham, a man approached him offering him help if he would not discuss the interrogation incident.

"(He) offered me any amount of money to say that the chief didn't beat me up and a ticket to anywhere I wanted. I told him, no deal. I don't want to make a deal with anyone."

EXHIBIT I

Cash gap grows; Deutcsh had warning

At least $40,000 - not $27,000 as at first reported - is missing from the Birmingham Police property room, according to an internal audit being conducted after Wednesday's discovery of the thefts.

A city auditor said Police Chief Arthur Deutcsh was warned last year that the money, some of which had been stored in sealed envelopes in a padlocked supply closet since 1976, was not in a secure area. The internal audit committee, in a report dated February 7, 1983, recommended that the money, except that needed as evidence, be deposited with the city's Finance Department for safekeeping.

Yesterday, in the wake of the thefts, Deutsch relieved two ranking officers of their command over the operations bureau, which includes the property room.

Deputy Chief George Wall and Inspector Tommy Rouse met with Deutsch about 11 a.m. Rouse said he was transferred to the patrol division.

"I resent the transfer. I'm quite angry about it. I think it's a personal attack on my integrity and job performance and by implication infers that myself or Chief Wall had something to do with the money missing," Rouse said.

Wall had not been given a new assignment yesterday, and could not be reached for comment.

Deutcsh's secretary said yesterday the chief would be unavailable for comment.

In a letter to Mayor Richard Arrington about the thefts, Deutcsh placed the blame for the problems in property procedures on a lack of direction from Wall and Rouse. He also said other top administrators were not performing their job duties.

Praising his civilian jail administrator, Frank Alexander, he asked for a special assistant from outside the force.

"Chief Wall, as some of my other top administrators (who are locked in by civil service) are either unwilling or unable to perform many of their assigned duties. Major Frank Alexander has been like a breath of fresh air because he is loyal to me, the department and yourself. In that vein, I submit that an executive assistant from the outside be made available to me."

Deutcsh also asked the mayor that Assistant City Attorney Charles Wyatt be assigned full time to the department.

"In closing, it should be noted that these discrepancies in our property procedures festered because of the lack of direction or administration by Chief Wall or his inspector. But the need for one central police facility (which is available) should again be discussed because these problems, as others, are not going to go away and will not be rectified by the piecemeal approach that has been utilized by past administrations," Deutcsh wrote.

Deutcsh has lobbied for a central police building to house all the divisions of the department, but Arrington has repeatedly rejected the idea.

Arrington met with Deutcsh yesterday to discuss the thefts, after which the mayor issued a statement saying Deutcsh was confident the case would be solved.

"The mayor is highly disturbed by this occurrence. A full-scaled investigation has been launched by the chief of police. The whole question of the storage and security of confiscated materials will be reviewed by the mayor," the statement said.

The money was discovered missing late Wednesday afternoon after Wyatt had asked for $9,000 seized by police at an earlier date. Wyatt said the court was going to determine who had the rightful claim to the cash, but would not elaborate on the case.

Property custodian Jim Thompson discovered the thefts when he went to retrieve the money. A further check of the room showed another envelope, containing $18,000, also was missing.

"I'm calm, because I didn't do anything wrong," said Thompson, who has held the job some 14 years.

Rouse noted that bonded, civilian employees are the only people who are responsible for the day-to-day operation of the property department, of which Ray McDuffey is head.

Police said Thursday the money had been kept in metal boxes in the property room, in the basement of City Hall. But Gregory Cobb, director of internal auditing, said he remembers from the 1983 audit that all the money was kept in individual sealed envelopes in a closet.

Police said it appeared the money containers had been cut with a sharp instrument.

The closet had two locks, the door lock and a padlock.

Cobb said that an audit showed several envelopes had been cut.

"It looks like at least $40,000 has been taken."

As of Aug. 31, receipts showed the property room was holding $35,592.56.

He said about $5,000 remains in the closet, but auditors found another $10,000 missing that had not been included in the August report.

Cobb said a 67-page report was issued after the 1983 audit. At that time, $23,238.91 was stored in the room. He remembers that at least five or six people had authorized access to the room but did not recall their names.

The audit showed that $18,780 that had been seized in a drug raid on July 25, 1982, was included in that amount.

Yesterday morning, two officers from internal affairs, which is investigating the thefts, came to the Birmingham Post-Herald in search of a picture they said had been taken of a raid on that date.

In its 1983 report, the auditing committee said the cash was in an unsecured location. It recommended that it be turned over to the Finance Department. It also said the property custodian does not receive information on the status of money

being held for six months or longer. Excluded from the report's recommendation was money needed as evidence.

"If the cash is not placed in a more secure location, there is a possibility that it could be misplaced, partially or entirely. Claims made by the rightful owner then become the expense of the city."

Cobb said Deutcsh responded in writing to the report.

"He said the police were implementing certain procedures to secure the area."

In a 25-page report dated Nov. 21, 1983, the chief outlined his response to the recommendations.

"Except for cash money that is required to be held for evidence or is advantageous to return immediately to its owner in its original form, the property custodian has established procedures to deposit all impounded cash immediately after it is receipted by the front desk."

Police said the property room once had a large safe but, for a reason that was unclear yesterday, the safe was taken from the room last year.

The room also contains valuables and guns. An inventory is still under way to determine if any of those items are missing. Confiscated drugs are kept at the North Precinct.

Police sources said yesterday that the transfer of Rouse and Wall was the beginning of a shakeup in department's hierarchy that has been in the works for several weeks.

Alexander, who could not be reached for comment, was placed in charge of the police pistol range in April.

Sources said the reorganization includes a detention and training division to be headed by Alexander; a patrol bureau headed by a deputy chief and an inspector; and an operations and detective bureau headed by a deputy chief aided by an inspector.

Under the operations bureau, Capt. Johnny Morris would be in charge of records, property and communication, sources said. Those sources said Morris, who is in charge of the crimes

against persons unit, was informed yesterday of his new assignment.

"I wasn't told officially. I don't have any other comment," he said.

In his reorganization, Deutcsh is trying to bypass the personnel board, Rouse said.

"His choosing a civilian over the police personnel (at the range) is an obvious attempt to circumvent the personnel board. Frank Alexander has only been here for a short while and has shown he is ambitious. He and the chief are both hard to communicate with. He has no police experience."

Rouse, who was a candidate for police chief three years ago when Arrington chose Deutcsh, said the chief gave him a high efficiency rating six months ago.

"If he had any problems with my performance or efficiency, he should have said something then.

"I've got over 20 years with the department. Frank (Alexander) has 14 months and the chief has almost three years. Wall has over 40 years in this community. I'll put my record up against anyone."

EXHIBIT J

Deutcsh and missing money

The discovery that more than $40,00 is missing from Birmingham's police property room has been revealing, both about this one aspect of police department operations and about the intentions of Police Chief Arthur Deutcsh.

The latter may even be more important in the long run given the fact that Birmingham citizens so rarely get any insight into the chief's thinking behind his self-build wall of public silence.

Beyond the basic question of who took the money, at least four issues have been raised by the theft and reactions to it.

Security of the property room. How was it possible for the thief or thieves to get into the property room in the first place?

There is no such thing as perfect security. Somebody with the will and opportunity can always find a way to breach it. But such breaches ought to be difficult to accomplish and immediately obvious when they do occur.

The amount of money taken, the fact that we still don't know the exact loss and the uncertainty about when the theft took place all indicate that property room security is far less than it should be.

More than likely, the theft involved civilian or sworn police personnel, which raises a second issue, that of administration and accountability.

Administration. The city's internal auditors warned in February 1983 that the property room operation had significant security problems. One of the key recommendations was that money, except that need as physical evidence, be deposited with the city's Finance Department for safe-keeping.

In November 1983, Chief Deutcsh, who had resisted the audit in the first place, responded with a 25-page report that included this passage:

"Except for cash money that is required to be held for evidence or is advantageous to return immediately to its owner in its original form, the property custodian has established procedures to deposit all impounded cash immediately after it is receipted by the front desk."

That obviously wasn't done. There was far more money in the property room than there should have been.

Why was the change not implemented? Was Deutcsh's report so much smoke to satisfy his superior, Mayor Richard Arrington? Or did the response get lost somewhere in the department's chain of command? Deutcsh's answer brings up the third issue.

Command shakeup. Chief Deutcsh has removed Deputy Chief George Wall and Inspector Tommy Rouse from their positions as the top two officers in the operations bureau, under which the property room falls.

Rouse has been reassigned to other duties, which at first glance seem superfluous. Wall was reassigned, but was told by Deutcsh either to retire or face charges before the Jefferson County Personnel Board.

Deutcsh's rush to judgment is highly disturbing. It is extremely unlikely that he has enough evidence at this point to place the administrative blame on these two officers. It seems clear that he has used the theft discovery as an excuse to further other goals.

While we occasionally have had disagreements with Rouse's outspoken views - Wall is a reticent man who seldom speaks out publicly - there has not been any previous indication that either officer is not suitable for the positions they have held in the department.

If there is truly justification for the chief's actions, it has not been made public. What seems more likely is that the chief is pushing his personal empire-building schemes as evidenced by his proposal to reorganize the department.

Reorganization of department. Before the discovery that the money was missing, Deutcsh had submitted an ambitious

plan to get around what he apparently sees as the overly restrictive constraints of the civil service system.

The chief wants an executive assistant - likely jail Administrator Frank Alexander- in effect placing the retired Marine officer next to the top of the chain of command. More specifically, Deutcsh proposes to place Alexander in charge of the police academy and the property room in addition to the jail and the firing range. He was put in charge of the latter last April.

Whatever Alexander's qualifications for his present duties, the idea of placing in charge of training new police officers a man not familiar with the day-to-day conditions these officers will face on the street is highly suspect. It raises all sorts of questions.

A legitimate argument can be made for freeing the selection of department heads from at least some of the constraints of civil service. It is a way of making government more responsive to elected officials.

But what Deutcsh is proposing is more likely to result in the opposite, a department head who is even less accountable to elected officials than at present and who has a way of getting around civil service. That is not only bad government, it is dangerous.

There is no little irony in this attack on civil service. Deutcsh would not himself be where he is if the personnel board had not limited Mayor Arrington's choice of a chief.

Reactions by public officials to unexpected situations often give valuable insights into the character of those officials. The property room theft has done so in the case of Arthur Deutcsh.

Those insights are not reassuring. They are highly disturbing.

EXHIBIT K

No confidence in Deutcsh

A police department cannot be run on the basis of popularity. A police chief must, on occasion, make decisions that are unpopular with some of his subordinates. There will even be times when a majority of the force disagrees with a particular decision.

But this does not explain the results of a poll conducted by the Fraternal Order of Police. The number of officers finding fault with the leadership of Police Chief Arthur Deutcsh goes far beyond the normal ebb and flow of popularity.

More than 90 percent of the responding officers feel that Deutcsh is not providing the needed type of leadership, that he is not fair in dealing with subordinates and that the department's morale is low. With nearly 70 percent of the department's officers returning ballots, this dissatisfaction cannot be dismissed as coming from a small group of disgruntled officers.

The poll results are a serious indictment of Chief Deutcsh's leadership.

This indictment cannot be talked away as resulting from Deutcsh's being an outsider brought in to shake up the department. Other city department heads have come in and made changes without the turmoil that has marked Deutcsh's tenure.

Granted, the cultural gap between New York and Birmingham may be deeper than in the cases of other department heads brought in from outside the city bureaucracy. But Deutsch didn't have to become a good old boy during the past three years to be an effective police chief.

What he had to do was earn the respect of those who serve under his command. If anything, he is less respected now than when he took the job. And that is entirely his own doing.

The FOP is an organization that likes to flex political muscles, sometimes in directions with which this newspaper

has disagreed. But its leaders and members do recognize that there are limits to the FOP's proper role.

In most circumstances, even calling for a vote of non-confidence in the chief would have exceeded those limits. But give the actual results and other evidence of problems with Chief Deutcsh's leadership, the FOP poll is a proper method for expressing the opinion of rank-and-file police officers.

Police dissatisfaction should not be the only criteria by which Mayor Richard Arrington, City Council members or the public judge Deutcsh's performance. But neither can that dissatisfaction be dismissed as irrelevant.

The FOP poll results are another piece in the dismal mosaic being created by Police Chief Arthur Deutcsh's performance.

EXHIBIT L

Arthur Deutcsh

The problem persists

Birmingham has a problem with its police chief.

That judgment has been stated in this space before. Unfortunately, it seems likely that repetition will be necessary in the future.

The problem shows no sign of disappearing and there are few signs that Mayor Richard Arrington is doing anything significant to rectify matters.

It is not news that Police Chief Arthur Deutcsh is something of a bully in his dealings with others. Nor is it news that he acts as though rules and laws made for lesser mortals don't apply to him. Nor that he is a persistent and at times apparently vindictive individual. These traits have been fully evident for some time.

But since the first of the year, there have been several events or revelations that underscore the depth of these traits and the seriousness of a situation created largely by Deutcsh's own actions. The twisting convoluted path extends from City Hall to both Personnel Board with a side trip into the state court system.

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In early January, a federal court order expired that had sealed documents concerning internal police investigations of at least six officers and the Fraternal Order of Police. The documents had been requested by lawyers for two officers who are suing Chief Deutcsh and the city. The documents were initially sealed by U.S. Magistrate Edwin L. Nelson at the request of the city because they supposedly involved an ongoing investigation.

But Nelson, after reviewing the documents, concluded that, at most, minor infractions of departmental rules were in-

volved. He went on to say, "The documents strongly imply that the investigation is focused, at least in part, upon the exercise of First Amendment rights of free speech and free association by one or more of those very same officers."

Among the documents covered by the lawyers' request is the transcript of a July 23, 1984, internal affairs interview of Police Officer Hank McWhorter. It is clear from the transcript that the investigators were less interested in wrongdoing than they were in how often McWhorter had talked to reporters and under what circumstances. There was also a clear tone of threat in the investigators' emphasis that McWhorter was not to talk to anybody about his session with internal affairs, including his own lawyer.

At the time, McWhorter was already at cross purposes with Chief Deutcsh because of two originally unrelated situations.

The Personnel board had asked a Jefferson County court to order Deutcsh and the city to transfer McWhorter back to a previous assignment. The department had refused to do so after an arbitration board found an earlier transfer to be an unwarranted disciplinary measure. That ultimately successful petition was pending in circuit court at the time of the internal affairs interview. After the city lost its appeal in the state court system, McWhorter was reassigned in compliance with a court order, only to be fired one day later on Jan. 18 of this year.

McWhorter also had made accusations in 1983 that Deutcsh may have mistreated a prisoner, James Lowe. This was based on events McWhorter heard and saw while outside a room in which Deutcsh and Lowe were alone. Lowe, however, never filed a complaint and the U.S. Justice Department dropped an investigation for lack of prosecutable evidence.

The internal affairs transcript is not the first evidence to surface suggesting that internal affairs investigations and other tactics have been used to stifle open discussion of the police department's operations — especially criticism of Deutcsh. Nor is it the last.

The day that McWhorter was fired, it became known that lawyers representing various police officers have become the subjects of complaints filed with the Bar Association because of public statements they made.

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Another internal affairs transcript, this one of a session with Police Lt. Billy Webb on Sept. 24, 1984, shows the same pattern as the McWhorter one. Webb was repeatedly asked about statements attributed to him by various reporters, about who he talked to and whether he was on duty at the time. Webb told the investigators he considered the session harassment by Chief Deutcsh.

The Webb case is somewhat different in that Webb and his wife, Gwen, former bodyguards for Mayor Arrington, were fired in December by Chief Deutcsh because of defamatory statements they are accused of making about the mayor. An appeal of those firings is currently being heard by the Jefferson County Personnel Board.

Giving Deutcsh and internal affairs every benefit of the doubt, one might argue that there was legitimate reason to talk to Webb about statements he might have made. But the questions do not appear related to the situation involving the mayor. Furthermore, City Attorney James Baker says he, not the police department, conducted the investigation leading to the firings.

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A third example of possible harassment involving internal affairs involves Sgt. Jimmy Sims, president of the FOP. On Friday, Jan. 25, Sims received word through his lawyer that internal affairs had ordered him (Sims) to appear before Chief Deutcsh the following Monday. This came one day after a deposition taken in a seemingly unrelated federal court lawsuit against the city had revealed that Sims was under investigation in an unspecified matter.

Sims, who is on sick leave because of a back injury and resulting surgery, showed up at the chief's office at the speci-

fied time only to find that the chief didn't want to see him. Sims then asked internal affairs if they wanted him. Receiving a negative reply, he went to the mayor's office where he talked to Ed LaMonte, one of the mayor's chief aides. As Sims was going into LaMonte's office, he was told that internal affairs would like to see him after all. According to Sims' wife, there have been subsequent attempts by internal affairs to see Sims, who has gone into seclusion apparently because the run around he received at City Hall aggravated his back problems.

Chief Deutcsh has since denied that Sims was ever ordered to come to his office, going so far as to write " . . . the entire incident that lead up to this alleged happening (my supposedly ordering Police Officer Sims to my office), was fabricated and orchestrated . . . "

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Deutcsh's fabrication accusation was included in a letter to Mayor Arrington denying that he (Deutcsh) had elbowed a reporter for The Birmingham News, Cindi Lash, while she was asking him about the Sims affair. Because there are not other witnesses to the alleged elbowing, Arrington had ordered the chief to write a letter combining his denial with an apology for any misunderstanding.

Arrington says he is still waiting for such a letter. He does not consider what the chief wrote as compliance with the order.

This is not the only recent case of Deutcsh failing to comply with orders in a timely fashion. Last week, U.S. Magistrate R. Macey Taylor ordered Deutcsh to pay $250 for his delay in responding to pretrial questions in a civil lawsuit filed against the chief by Sgt. Nolan G. Hopkins. The magistrate also ordered Deutcsh to file supplemental answers for earlier responses found to be inadequate.

The questions were first submitted back in September. On Nov. 28, not having received any response, lawyers for Hopkins requested the district court to compel answers. On Dec. 3, since retired Magistrate James F. Reddoch, Jr., ordered

answers within two weeks. In January, Hopkins' lawyers went back to court and requested monetary sanctions. On Jan. 10, Deutcsh's answers were filed but had to be returned because they hadn't been signed. The court received them again on Jan. 14.

Assistant City Attorney Charles Wyatt has argued that the holidays and other pressing business caused the delay. He also argues that the responses were adequate. Taylor correctly rejected both arguments.

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Although it does not seem relevant to their case at this point, the Webbs' appeal hearing had also made public another incident in which Deutcsh may have engaged in an attempt at physical intimidation. During testimony Monday, City Councilman John Katopodis said that Deutcsh once hit him in the stomach while addressing the council member with a vulgar term.

In earlier testimony, Deutcsh denied ever hitting Katopodis. And Katopodis admitted in his own testimony that it is sometimes difficult to determine whether Deutcsh is serious or merely engaged in rough horseplay. As with the Lash incident, there are no independent witnesses.

The Lash and Katopodis incidents should be added to at least two previous incidents in which Deutcsh was accused of undue physical aggression.

Yet another situation involving Deutcsh in recent weeks is that of Lt. B. R. Stephens.

Unfortunately, much remains unknown about the facts behind a 30-day suspension that Deutcsh gave Stephens last week for allegedly allowing harassing phone calls to be place on the Stephens family phone to Deutcsh's home — especially what, if any, evidence exists and if it does whether it was legally obtained. That should come out in Stephens' appeal to the Personnel Board.

But the treatment Stephens has received from Deutcsh fits the all too familiar pattern of vengeful harassment.

Like McWhorter, and involving some of the same incidents, Stephens has long been at odds with the chief. Last year, he was suspended and demoted for alleged violations of departmental regulations involving secret tape recording. The Personnel Board reversed the chief's actions.

While the phone harassment charges were pending, Stephens was charged with a second offense concerning a badge he reported stolen. The charge was dropped before Deutcsh was to hold a hearing, perhaps because it was belatedly realized that any disciplinary action would be far out of line with the department's treatment of other officers in similar circumstances.

But the same day, Stephens was called back to internal affairs for further questioning about the phone charges. His lawyer, Ray Fitzpatrick, had already agreed to an extension of the deadline for Deutcsh to serve his final determination in the phone case. But when Fitzpatrick found out about the internal affairs session, he protested that Stephens was being harassed.

An additional indication that the phone harassment charges might be sparked more by vindictiveness than a desire to discipline an erring officer is their timing. Four of the calls were supposedly made last February, two others in September. If all of the calls can be linked, why are charges only being made now? What evidence could become available so long after the fact that didn't exist earlier? And why can Stephens be held responsible for calls from his home at a time he was away on duty, as he says is the case with the September calls?

Like many other incidents involving Deutcsh there are more questions than there are answers.

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Just over a year ago, this newspaper called Arthur Deutcsh an out-of-control police chief. Nothing in the events of recent weeks counters that judgment. But much confirms it.

Chief Deutcsh is continuing on a course of his own choosing, for reasons known only to himself, that has already seri-

ously damaged the Birmingham Police Department and many of its officers. If allowed to continue, his performance will do even more damage, in ever widening circles.

Only one of three things can contain the damage to that which already exists. Either Deutcsh may change his ways on his own; Mayor Richard Arrington must rein in the chief's behavior or Deutcsh must relinquish the chief's office.

Unfortunately, the odds are decidely against Deutcsh correcting himself. It does not appear in his character to admit error. Either that or he has met a lot of liars since coming to Birmingham, considering how freely he makes that charge.

If Deutcsh can't change on his own, that leaves only two options. And both of them are in the hands of Mayor Richard Arrington.

The mayor's failure so far to choose one of them, or even to concede a need to act, reflects on his own performance and judgment.

Supreme Court, U.S.
FILED
DEC 7 1992
OFFICE OF THE CLERK

Case No. 92-811

IN THE

Supreme Court of the United States

October Term, 1992

ARTHUR V. DEUTCSH,

Petitioner,

v.

BIRMINGHAM POST COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Court should review a dismissal of a libel action brought by a public official where no court that has considered the case has ever found a single element of the tort of libel present.

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Case No. 92-811

IN THE

Supreme Court of the United States

October Term, 1992

ARTHUR V. DEUTCSH,

Petitioner,

v.

BIRMINGHAM POST COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF IN OPPOSITION

Respondent Birmingham Post Company ("the newspaper"),[1] publisher of the *Birmingham Post-Herald* ("*Post-Herald*"), respectfully prays that the instant Petition be denied. Review in this Court is inappropriate because the First Amendment to the United States Constitution prohibits a public official from recovering damages for libel unless he proves by clear and convincing evidence that allegedly defamatory statements were false and were made with actual malice. *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Petitioner has not

1. Birmingham Post Company is a wholly-owned subsidiary of Scripps Howard, Inc., which is a wholly-owned subsidiary of the E. W. Scripps Company.

challenged the fundamental holding of the decision below – that the statements at issue are true. Instead, Petitioner continues to complain about the way he was treated by the newspaper and blame his abundant problems in Birmingham on accurate news reports.

STATEMENT OF THE CASE

This case began more than a decade ago, when the City of Birmingham hired Petitioner as its police chief.[2] A native of Brooklyn, New York, with no previous experience or contacts in the Birmingham Police Department, Petitioner was employed on a probationary basis for his first year. He successfully completed the first year, and was officially appointed police chief of Birmingham in December 1982. Shortly thereafter, he became embroiled in one controversy after another with different segments of the government in Birmingham. The Alabama Ethics Commission investigated his decision to accept gifts of large appliances from local businessmen and a discounted mortgage loan from a local banker. *See* Record of the Proceedings Below at pages 1840-43 ("R. 1840-43"), R. 1890-98. The City Council resisted Petitioner's demand for payment of his moving expenses, and one City Council meeting turned into an ugly shouting match between Deutcsh and Councilman Russell Yarbrough. R. 1822-23. Mayor Richard Arrington, who had appointed Petitioner, investigated allegations that Petitioner mistreated two disabled arrestees, and ordered the police

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2. At the time the articles were written and the lawsuit was filed, Petitioner Arthur Deutcsh was chief of the Birmingham Police Department. He was convicted of misdemeanor records tampering, on May 24, 1991, and sentenced to one year of hard labor and a $2,000 fine. He appealed the conviction, and it was overturned by the Alabama Court of Criminal Appeals on July 24, 1992. The case was submitted to the Supreme Court of Alabama for preliminary examination, but the court has yet to decide whether it will issue a writ of certiorari. After his conviction, Petitioner was placed on paid, administrative leave from his duties as police chief. In January 1992, Petitioner fell down the steps of Birmingham City Hall. He was diagnosed with neck and back injuries and awarded a disability pension of $53,732 per year by a 3-2 vote of the Birmingham Retirement and Relief System.

internal affairs department to look into allegations that Petitioner beat a suspect during an interrogation. R. 1650, 1927-30. And the Birmingham Fraternal Order of Police ("FOP") clashed repeatedly with Deutcsh over allegations that he selectively enforced department regulations against FOP leaders. *See, e.g.*, R. 1719-20, 2396, 2398-400, 2505-41.

Plagued by controversy, Deutcsh's tenure as police chief was covered by the local media, including the newspaper, which dutifully informed the citizens of Birmingham about the questionable conduct of the public official charged with ensuring their safety.

After nearly two years of news coverage, Petitioner filed his original complaint on November 19, 1984. It alleged that every word of fifty-seven separate newspaper articles and editorials was both false and defamatory. R. 1-6. To this day, Petitioner has failed to prove that even a single word of a single article is false. *See Deutcsh v. Birmingham Post Co.*, 603 So. 2d 910, 912 (Ala. 1992).

The procedural history of this case demonstrates the considerable effort and expense required to elucidate Petitioner's claims. On February 11, 1985, the newspaper asked the Alabama Circuit Court to dismiss the complaint or force Petitioner to identify which specific statements in the fifty-seven articles were false. Petitioner responded by amending his complaint, but again failed to identify, with specificity, any allegedly false and defamatory statements, prompting the newspaper to file a second motion to dismiss. While the motion was pending, Petitioner again amended his complaint, on April 26, 1985. The Second Amended Complaint, Petitioner's third opportunity to specify false and defamatory statements, failed to do so. The newspaper then withdrew its pending motion and moved to dismiss the Second Amended Complaint for failure to state a claim and for failure to comply with the statute of limitations. On October 11, 1985, the court granted the newspaper's motion in part, dismissing Petitioner's claims based on nine time-barred articles.

In the fall of 1985, the parties embarked on extensive discovery. Petitioner noticed the depositions of twenty-two

persons. The newspaper propounded its First Set of Interrogatories on November 22, 1985. Petitioner did not respond within the required thirty days, and the newspaper filed a motion to compel on February 11, 1986. No answers were received and, on April 14, 1986, the newspaper moved to dismiss the lawsuit based on Petitioner's failure to respond to discovery requests. Petitioner filed incomplete interrogatory answers, and, on October 14, 1986, the court ordered Petitioner to supplement those answers in response to another motion to compel by the newspaper. No supplemental responses were received and, on December 16, 1986, the newspaper moved to dismiss the case for failure to comply with a court order. Petitioner finally supplemented his interrogatory answers on December 29, 1986, over a year after they were served.

A similar scenario unfolded after the newspaper requested documents on November 22, 1985. No documents were produced within thirty days, and the newspaper filed a motion to compel that the court granted on December 31. Petitioner still failed to produce any documents and, on April 3, 1987, the newspaper filed another motion to dismiss based on Deutcsh's failure to comply with court orders. Petitioner then produced a number of documents, but did not fully respond to the newspaper's request. The newspaper followed, on October 13, 1987, with a third motion requesting dismissal of the action based on Deutcsh's failure to comply with court orders.

On June 29, 1988, after nearly three years of frustrated attempts to conduct discovery, the newspaper filed another Motion to Compel a More Definite Statement. The court granted this motion and entered an order to that effect on December 21, 1988. When Petitioner failed to comply, the court entered another order on February 22, 1989. Then, on October 25, 1989, the newspaper filed yet another motion to dismiss based on Deutcsh's failure to comply with court orders because, after nearly five years of costly litigation, Petitioner still had not identified any specific statements as allegedly false. Eventually, on April 24, 1990, Petitioner identified 137 specific statements in thirty separate articles which he claimed were false and defamatory.

Having finally succeeded in flushing out Petitioner's claims, the newspaper filed a motion for summary judgment on September 21, 1990. After considering the issues for nearly a year, the Circuit Court granted the motion and dismissed the case with prejudice on September 16, 1991.

Petitioner appealed the Circuit Court's dismissal of his claim to the Alabama Supreme Court. Although the trial court had winnowed the case down to thirty articles, his appeal only addressed thirteen. The Alabama Supreme Court held that Deutcsh had waived any claim of libel based on the other seventeen articles and upheld the dismissal of his remaining claims on multiple grounds after considering the voluminous record and briefs filed by both parties.[3] *See Deutcsh*, 603 So. 2d at 911-12. The court's opinion states:

(1) there was "no clear and convincing evidence of libel in any of the statements in the articles";

(2) "Deutcsh failed to present evidence that the statements in the non-editorial articles were false and defamatory . . ."; and

(3) "Deutcsh failed to show that any of the statements of public concern in the editorials contained a provably false factual connotation."

Id. at 912. Petitioner applied for rehearing, which was denied on August 7, 1992.

Thus, after eight years of litigation and extensive effort on the part of the newspaper and the Alabama courts, Petitioner's claims have been limited to twelve[4] articles and editorials published in the *Post-Herald* during 1983, 1984, and 1985. These news stories are unremarkable reports about routine controversies that occur in many municipalities every day. Their

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3. Petitioner's Alabama Supreme Court Brief and Reply totaled ninety-one pages, excluding appendices. The newspaper's brief was sixty-two pages and included a four-volume appendix of over 1,500 pages.

4. Petitioner requested that the Alabama Supreme Court review claims based on *thirteen* articles, but only references *twelve* in his Petition to this Court. Accordingly, Petitioner has abandoned any review of a claim based on the omitted May 23, 1984 article. *See infra* at 7.

ordinariness hardly makes them less newsworthy. United Press International, for example, carried seventy-four separate stories about Deutcsh's exploits between November 1983 and February 1985. *See, e.g.*, R. 1959, 2017, 2393-94, 2396-97.

This Petition is nothing more than the final stage of a public official's attempt to make the newspaper "pay" for reporting the news. Unable to prevail on the merits, he has subjected the newspaper to years of costly litigation. Petitioner's actions have shown that he is, as Mayor Arrington stated, "too sensitive to criticisms, sometimes needlessly abrasive, and quite 'bull-headed.'" R. 2488 (February 1985 performance evaluation of Deutcsh submitted to Jefferson County Personnel Board by Mayor Arrington).[5] As a visible public official whose conduct had a discernable impact on the everyday life of each citizen of Birmingham, Petitioner could hardly expect to remain free from news coverage or commentary. But apparently he had precisely such expectations.

REASON FOR DENYING THE WRIT

REVIEW IN THIS COURT IS INAPPROPRIATE BECAUSE THERE HAS NEVER BEEN A LIBELOUS STATEMENT PUBLISHED ABOUT PETITIONER WITH OR WITHOUT ACTUAL MALICE.

A. Petitioner Has Never Established That A False Statement Was Made About Him.

To establish a *prima facie* case of libel under Alabama law, Petitioner must prove by clear and convincing evidence that each allegedly defamatory statement was:

(1) false and defamatory;

(2) of and concerning him;

(3) not privileged; *and*

(4) published with actual malice.

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5. Mayor Arrington also noted Petitioner's "tendency to be argumentative" and "disagreeable," his inability "to maintain his 'cool' in the face of hostile inquiry and accusation," and his "tend[ency] to ignore advice which differs from his opinions." R. 2157 (February 1984 performance evaluation), R. 2488 (February 1985 performance evaluation).

Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. at 775-76; *New York Times Co.*, 376 U.S. at 286-91; *McCaig v. Talladega Publishing Co.*, 544 So. 2d 875, 877 (Ala. 1989), *citing* Restatement (Second) of Torts § 558 (1977); *White v. Mobile Press Register, Inc.*, 514 So. 2d 902, 904 (Ala. 1987).

Petitioner has chosen not to request review by this Court of the central holding below that he had failed to prove falsity. He quibbles only with the lower court's consideration of evidence relating to actual malice. *See* Petition at 27. It must, therefore, be presumed that Petitioner has abandoned his claim of falsity and that his long road in this litigation ends with the tacit acknowledgment that the newspaper's reports about his problems in the community were true. *See Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 694 (1989) ("*Connaughton*") (Blackmun, J., concurring) ("Petitioner has abandoned the defense of truth. . . . We therefore must presume that the jury correctly found that the article was false . . ."); *Brenner v. Local 514, United Bhd. of Carpenters*, 927 F.2d 1283, 1298 (3d Cir. 1991) (failure to include a legal argument in a statement of the issues waives that argument).

Truth is an absolute defense to any action for defamation. By abandoning and otherwise failing to prove falsity, Petitioner has neglected to establish an essential element of any defamation action. *See, e.g., New York Times Co.*, 376 U.S. at 271-72. The Alabama Supreme Court, after finding Petitioner could not establish even the threshold element of libel (*i.e.*, falsity), chose not to address the second and third elements – whether the articles were of and concerning Petitioner and whether the publication was privileged – although both issues were briefed for the court. The court did go on to consider Petitioner's actual malice argument, and found it utterly lacking.[6]

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6. Even if Petitioner were correct in his unsupported assertion that the Alabama Supreme Court did not consider evidence of actual malice, it would not alter the fact that dismissal of this action was appropriate because the statements at issue are true. *See New York Times Co.*, 376 U.S. at 271-72; *see also* 28 U.S.C. § 2111 (1988) ("[o]n the hearing of any . . . writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties").

B. Petitioner Has Never Established By Clear And Convincing Evidence That A False Statement Of Fact Was Made With Actual Malice.

It is now firmly established that the Constitution of the United States requires a public official, in order to prevail in a libel suit, to prove by clear and convincing evidence that each false and defamatory statement was published "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co.*, 376 U.S. at 279-80; *see also Masson v. New Yorker Magazine, Inc.*, 111 S. Ct. 2419, 2429-30 (1991). If a public official fails to make such a showing at the summary judgment stage, summary judgment for the defendant is appropriate. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254-56 (1986) (federal law); *Pemberton v. Birmingham News Co.*, 482 So. 2d 257, 260 (Ala. 1985) (Alabama law).

Petitioner's claim that the Alabama Supreme Court did not properly consider his evidence of actual malice is unsupported by the record and belied by the court's own words. The court left no doubt that it considered and rejected Petitioner's proffered evidence of actual malice as unreliable and insufficient to meet his weighty burden. Its opinion states that the court "thoroughly" reviewed the articles at issue and "[v]iew[ed] the evidence in a light most favorable to Deutcsh . . . ." *Deutcsh*, 603 So. 2d at 912. After reviewing a record of over 2,500 pages, the court's decision not to discuss specific evidence of alleged actual malice, either in support of or contrary to Petitioner's claims, is understandable and perfectly proper.[7]

No reasonable jury could find that a specific false statement here was published with actual malice. *See Anderson*, 477 U.S. at 257 ("reasonable jury" standard applies to motion for summary judgment on the issue of constitutional malice). By definition, actual malice cannot exist where falsity does not. *See*

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7. The court was well aware of Deutcsh's relentless argument that the newspaper was "out to get" him, *see, e.g.*, Petition at 3, and found the argument unavailing. Petitioner's Brief to the Alabama Supreme Court quoted the portions of his deposition supporting his actual malice claim; those same deposition excerpts were again referenced in his Reply Brief. *See* Brief and Argument of Appellant Arthur V. Deutcsh at 7-9; Reply Brief of Appellant Arthur V. Deutcsh at 4.

Philadelphia Newspapers, Inc., 475 U.S. at 778 ("evidence offered by plaintiffs on the publisher's fault . . . will generally encompass evidence of the falsity of the matters asserted"); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964) (actual malice is a subjective standard requiring proof that the publisher had a "high degree of awareness of . . . probable falsity . . ."); *Shutt v. Harte-Hanks Communications, Inc.*, 7 Media L. Rep. (BNA) 2559, 2562 (E.D. Mich. 1981) ("[a]n action for libel cannot be based on a claim of lack of fairness, so long as the article in question is truthful"). And, because Petitioner has not carried his burden of proving that even a single statement in the articles is false, he cannot prove actual malice.

Petitioner's "evidence" of actual malice is nothing but bald allegations and invective. He claims that, at a cocktail party, the then-editor of the *Post-Herald* threatened to run him out of town, but the only proof offered for this highly implausible suggestion is Petitioner's own uncorroborated deposition testimony. He also claims that the author of several editorials relied on "known unreliable sources," but no evidence or other proof has been adduced or offered in the course of this eight-year litigation. Without support, these conclusory allegations are insufficient as a matter of law. *See Anderson*, 477 U.S. at 248-49. Finally, Petitioner offers the impressions of Mr. Glosecki, a Professor of Old English Literature at the University of Alabama with no journalistic experience. Glosecki's notions are not competent evidence of actual malice and address an issue which is left to the province of a jury in a libel case – the meaning of language.[8]

This hodgepodge falls far short of proving by clear and convincing evidence that the newspaper was aware the statements were false or "entertained serious doubts as to the truth of [the] publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). Instead, Petitioner tries to shoehorn his bare allegations into the "'unmistakably' sufficient" evidence of actual malice addressed by this Court in *Connaughton*. *See* 491 U.S. at 693,

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8. Although Petitioner refers to Glosecki as an expert, no experts have been designated or qualified in this case because there was no trial below. *See* Fed. R. Evid. 702.

quoting Curtis Publishing Co. v. Butts, 388 U.S. 130, 172 (1967). This case, however, is not *Connaughton*. There, the defendant intentionally neglected to interview the witness most likely to corroborate or dispute the statements, and chose not to listen to tape recordings which were available to disprove the statements. 491 U.S. at 683. Here, the articles and editorials are ordinary, balanced reports of typical controversies surrounding a local public official. And, unlike the statements in *Connaughton*, they are true.

CONCLUSION

The articles and editorials at issue are the bread and butter of a local newspaper. They are reports, and commentary, about a chief of police who was accused of committing police brutality, accepting gifts from local businessmen, mistreating a paraplegic and a quadraplegic, and badgering officers who were active leaders in the police union. From time to time, public officials in America doggedly pursue libel cases against newspapers for accurately reporting such events. Twenty-five years after the Commissioner of Montgomery, Alabama generated *New York Times Co. v. Sullivan*, a former Police Chief in Birmingham, Alabama has now reminded us that it can take eight years for a meritless libel case to reach a merciful end.

For the foregoing reasons, Respondent Birmingham Post Company respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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